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Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment

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The U.S. Sentencing Commission's Troubling Silence about the Purposes of Punishment

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INTRODUCTION

The Sentencing Reform Act of 1984 (the "SRA") marked a revolutionary change in the federal sentencing process.[1] One commentator characterized the Act as "probably the most significant development in 'judging' in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure."[2]

One obvious change triggered by the Act was *institutional*. The statute created the U.S. Sentencing Commission, and it directed the Commission to promulgate binding rules—innocuously named "guidelines"—to reduce sentencing disparities and ensure that sentences for federal offenders were appropriately strict. But the Act marked a dramatic *philosophical* change in federal sentencing, as well. The SRA called upon the U.S. Sentencing Commission to rationalize the sentencing system, specifically by ensuring that its guideline decisions reflect the traditional "purposes of punishment," including deterrence, incapacitation, rehabilitation, and just deserts.

The Commission satisfied its *institutional* obligation when it promulgated the initial set of sentencing guidelines in 1987. But, to date, it has neglected the *philosophical* mandate entirely. It has refused to address or identify the purposes of punishment that ground the guideline system.

This silence may seem, at first, like a rather abstract and academic defect. But I will suggest that the Commission's failure to confront sentencing purposes has

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984). The Sentencing Reform Act of 1984 was part of Title II of the Comprehensive Crime Control Act of 1984, which was signed into law on October 12, 1984.

2. Frank O. Bowman, III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 679.

led to a series of serious, if underappreciated, practical problems in the guideline system.[3] Among other things, it has undermined the Commission's ability to reduce sentencing disparity in a coherent manner and to undertake an independent and dispassionate approach to sentencing policy—the two major policy goals set out in the SRA. To the extent that satisfying Congressional intent and fulfilling Congressional policy goals constitute an important standard of success (as I will assume), then the Commission's neglect of sentencing purposes represents a major failing of the U.S. Sentencing Commission.[4]

Needless to say, the effort to refocus attention on sentencing purposes may be particularly timely. Last year, the Commission announced a new policy priority—"in anticipation of the 15 year anniversary of the federal sentencing guidelines"—to study how well the guidelines are serving the "goals of sentencing reform described in the Sentencing Reform Act and the statutory purposes of sentencing set forth" in the Act.[5] This is an extremely

3. The relationship between sentencing purposes and the sentencing guidelines has not been entirely ignored. I am particularly indebted to the pioneering work of Marc Miller and the more recent writings of Douglas Berman. See, e.g., Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413 (1992); Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines, 76 Notre Dame L. Rev. 21 (2000). Miller's and Berman's articles primarily address the role of the courts in identifying the purposes of punishment underlying the guideline system. In contrast, my focus is on the Commission's role in this task.

4. One might reject Congressional intent as the appropriate standard of success. In that case, the Commission's neglect of sentencing purposes might be viewed in a different light. For example, one might conclude that the guidelines should be judged based on how well they mirror the public's views of just punishment. If so, one might find the Commission's approach appealing since, as I argue below, the agency's failure to articulate sentencing purposes has made the Commission more susceptible to public pressure. See infra Part IV.B.

5. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 48306, 48307 (Sept. 19, 2001). See also Diana E. Murphy, Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond, 87 Iowa L. Rev. 359, 394 (2002). In recent testimony before the Senate, the Chair of the Commission made this initiative a centerpiece of the Commission's ongoing research efforts:

> The Commission . . . is statutorily responsible for monitoring how well sentences imposed under the guidelines are achieving the purposes of sentencing . . . . Soon we will experience the 15-year anniversary . . ., and

important initiative, the first time since the enactment of the guidelines that the Commission has taken a step back to consider whether the guidelines are promoting punishment purposes.

Yet, the project as it is presently conceived is flawed in a vital respect. As I will argue, to fulfill the policy goals set out for it by the Congress, the Sentencing Commission must begin to make some hard choices about sentencing purposes. That is because the traditional purposes of punishment often have different ramifications for the structure of a sentencing system; a guideline that promotes one purpose often fails to advance another.[6] As a result, if the Commission is to make an assessment of the guidelines' effectiveness, it must make a determination of which purpose of punishment is primary, or at the very least explain how the different purposes are to be weighed against each other. The Commission, in short, must adopt an integrated and internally consistent sentencing philosophy.

It seems unlikely that the Commission will take this critical step as part of its anniversary review. The limited information released by the Commission thus far suggests that the Commission intends to survey the relationship of the guidelines to each sentencing purpose, without prioritizing the purposes of punishment.

That would represent an enormous missed opportunity for the agency to reformulate its role. Only a clear and explicit sentencing philosophy that resolves conflicts among the purposes of punishment will clarify the meaning of the guideline rules, and thus reduce sentencing disparity. Only the articulation of such a philosophy will establish the Commission as a voice of principle in the sentencing field,

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> the Commission believes it prudent to step back and examine the operation of the guidelines over these years. . . . Questions that we hope to address include how well the guidelines are accomplishing the statutory purposes of sentencing, including crime control . . . .

Statement of Judge Diana Murphy, Chair of U.S. Sentencing Commission, before the Senate Judiciary Criminal Justice Oversight Committee, 13 Fed. Sent. Rep. 98, 103-04 (2000).

6. See infra Part II.C.

strengthening its ability to resist public pressures in the volatile criminal justice arena. In short, only by articulating a sentencing philosophy that prioritizes the various sentencing purposes will the Commission have a chance to fulfill the policy goals set out for it in the SRA.

This analysis proceeds in five parts.

Part One offers a brief synopsis of the sentencing reform movement leading to the passage of the SRA. This Part focuses on the two core policy goals underlying the reform movement. Clarifying these goals is an important first step in understanding why Congress made sentencing purposes such a central feature of its rationalizing legislation.

Part Two examines the role of sentencing purposes in the modern reform effort. This Part suggests that achieving Congress's core policy goals requires the Commission to take a stand on sentencing purposes, which ultimately means taking a stand on the moral theories of utilitarianism and retribution that underpin these purposes. Thus, the SRA, by calling upon the Commission to ground its policy decisions on purposes, envisions a guideline system that is a principled expression of the underlying moral theories.

Part Three explores the Commission's response to this philosophical mandate, tracing how the Commission sought to suppress discussion of sentencing purposes in the development of the guideline system. Although the Commission's approach has been severely criticized in the past, few commentators have accurately identified what was wrong with the Commission's original methodology, confusing the agency's rhetoric with the reality of its approach. Clarifying the issue results in a deeper appreciation of the Commission's institutional role in defining the purposes of the guidelines.

Part Four offers an additional criticism of the Commission's approach. Even assuming that the Commission based its guideline decisions on sentencing purposes, the agency failed to articulate publicly the reasons for its decisions. That failure conflicts with

Congressional intent. It also undermines the Commission's ability to reduce disparity and recalibrate sentencing severity. The implication is that, to fulfill its central policy goals, the Commission must articulate a *public* statement of purposes.

Part Five identifies and then evaluates two potential arguments in defense of the Commission's "purpose-less" approach. The first, advanced by Cass Sunstein, contends that "incompletely theorized agreements"—agreements that suppress underlying principles—represent the best way for the Commission to ensure public acceptance of its rules. The second argument, which has been called the "common law" approach to guideline sentencing, contends that the judiciary, rather than the Commission, should take the lead in articulating the purposes of the Guideline system. Neither argument, I suggest, is ultimately persuasive in undercutting the argument for a public statement of sentencing purposes.

Over the past fifteen years, a steady chorus of commentators has called for major statutory changes in the guideline system; some have even called for the abandonment of the guideline system altogether.[7] Such a statutory reversal is unlikely at the present time. In the absence of this kind of dramatic reform, the question facing the Sentencing Commission is daunting: How, in the current volatile political environment, can the agency fulfill the major policy goals set forth in the SRA? This paper

7. See, e.g., Jose A. Cabranes, Sentencing Guidelines: A Dismal Failure, N.Y. L.J., Feb. 11, 1992, at 2; Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901 (1991) (arguing for dramatic changes in the guidelines). See generally Douglas A. Berman, A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking, 11 Stan. L. & Pol'y Rev. 93, 93 (1999) ("[B]arely a decade since the . . . reforms became effective, many judges, lawyers and scholars contend that the federal sentencing laws and practices are now as bad as, or even worse than, ever. Even vocal supporters of modern reforms readily acknowledge that the federal sentencing system is far from perfect."). But cf. Frank O. Bowman, III, supra note 2, at 680 (the guidelines "are, at worst, a marked improvement over the system they replaced and are, on balance, a notable, albeit certainly imperfect, success.").

offers one modest suggestion: The Commission must begin to articulate a coherent sentencing philosophy.[8]

I. THE MODERN SENTENCING REFORM MOVEMENT

A useful place to begin this discussion is with the events leading up to the passage of the SRA. This is well-traveled ground, and I do not intend to survey in detail the history of the modern reform movement. Rather, the focus here will be on clarifying the principal policy goals of the Act. Understanding those core objectives will be essential for grasping the central role that punishment purposes play in the rationalizing legislation.

A. The Goals of Sentencing Reform

For most of the 20th century, federal sentencing followed an "indeterminate" method of punishment.[9] This approach was marked by a division of sentencing authority among the three branches of government. Congress established a range of acceptable punishments for each crime, the judiciary chose a specific sentence within that range for each offender, and the Executive Branch (operating through the U.S. Parole Commission) determined the precise date an offender would be released from prison.[10]

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8. The question of what sentencing philosophy underpins the guidelines is the subject of a separate article. See Aaron Rappaport, Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines, 52 Emory L.J. 557 (2003).

9. See Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.").

10. In this regard, the parole board played an important role in setting the ultimate sentence. See Mistretta, 488 U.S. at 363 ("This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the 'guidance and control' of a parole officer."); Williams v. New York, 337 U.S. 241, 248 (1949) ("Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments.... Execution of the United States parole system rests on the discretion of an administrative parole board."). For further discussion of the

Within this system, the judiciary possessed nearly unfettered discretion. The trial judge could impose a sentence anywhere within the broad statutory range set by Congress.[11] The court, moreover, was under no obligation to explain its rationale for the imposed punishment. And appellate review of sentencing was virtually non-existent.

During the late '60s and early '70s, reformers on both the left and the right began to examine ways to reduce judicial discretion.[12] They converged on the idea of an expert agency—a sentencing commission—that would enact guidelines to limit judicial discretion and provide a more uniform approach to criminal punishment.[13] The reformers were concerned with two major flaws in the indeterminate system of judicial discretion.

The first was a concern that judicial discretion led to "sentencing disparity," which occurred when similarly situated offenders received disparate sentences.[14] Studies showed that under the indeterminate sentencing model disparity was a prevalent problem, and that identical

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parole board's function and governing philosophy, see Kate Stith & Jose A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 Nw. U. L. Rev. 1247, 1249-50 (1997).

11. See, e.g., Michael Tonry, Twenty Years of Sentencing Reform: Steps Forward, Steps Backward, 78 Judicature 169, 169-70 (1995) (discussing wide discretion available to judges under earlier system); Stith & Cabranes, supra note 10, at 1248-49 (describing pre-Guideline system). See also Mistretta, 488 U.S. at 363 ("Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.").

12. Andrew von Hirsch, The Sentencing Commission's Functions, in The Sentencing Commission and its Guidelines 3, 3 (Andrew von Hirsch et al. eds., 1987) ("Beginning in the 1970s, disenchantment with discretionary sentencing began to develop.").

13. See John H. Kramer, Offender Characteristics and the Purposes of Sentencing, 9 Fed. Sent. Rep. 127, 127 (1996) ("The primary attack was on the unbridled discretion given to judges and parole boards.").

14. See U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 8 (1987) [hereinafter Supplementary Report] ("The overriding . . . concern with the existing system . . . was directed at the apparent unwarranted disparity and inequality of treatment in sentencing of similar defendants who had committed similar crimes.").

defendants often received different penalties simply because they appeared before different judges.[15] It mattered, in other words, whether a defendant was sentenced before Hang-em Harry or Let-em-loose Lou.

For many, the disparate treatment of offenders in vital matters of individual liberty violated core tenets of fairness.[16] Judge Frankel, in his highly influential work *Criminal Sentences: Law without Order*, criticized the sentencing system for being "lawless."[17] Particularly troubling was the emerging evidence that lawless sentencing worked to the detriment of minority groups.[18] Judges, it seemed, tended to be more lenient with those offenders with whom they could identify than with offenders thought to be somehow "different." Although conservative theorists also expressed some concern with this issue, liberal reformers made the goal of eliminating

15. For a discussion of some of these empirical studies, see Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 883 n.3, 897 n.82 (1990); Charles J. Ogletree, Jr., The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1944 n.38 (1988).

16. The concern was simply that "the prior indeterminate sentencing system permitted extremes of disparity that cannot be tolerated in a modern system of justice governed by the rule of law." Richard S. Frase, Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines, 44 St. Louis U. L.J. 425, 444 (2000). See also Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 2 (1972) ("Those of us whose profession is the law must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society, the power to take liberty . . . by process of what purports to be law.").

17. Marvin, E. Frankel, Criminal Sentences: Law Without Order 3-11 (1972) [hereinafter Criminal Sentences]. See also Marvin E. Frankel, Sentencing Guidelines: A Need for Creative Collaboration, 101 Yale L.J. 2043, 2044 (1992) (indeterminate sentencing was "lawless."); Marvin E. Frankel, supra note 16, at 1. Many attribute the birth of the modern sentencing reform movement to the publication of Judge Frankel's 1972 book. See, e.g. Berman, supra note 3, at 27 (Frankel's book "was probably the single most significant catalyst for modern sentencing reforms."); Kevin R. Reitz, Sentencing Reform in the States, 64 U. Colo. L. Rev. 645, 650 n.21 (1993) (Frankel's book was the "most influential work of criminal justice scholarship in the last 20 years," and its proposals "charted the general outline of sentencing reform through the 1980s and into the 1990s.").

18. See Nagel, supra note 15, at 895 ("[d]iscretion seemed inextricably linked with discrimination.").

sentencing disparity—of achieving greater uniformity in sentencing—a core part of their agenda.[19]

The second key issue was the severity of criminal sentences. Many reformers—particularly those on the right of the political fence—believed that sentences under the indeterminate scheme were far too lenient, and that this state of affairs could be attributed to the tendency of judges to coddle criminals.[20] That sentiment was shared increasingly by the public.[21] For these reformers, a sentencing commission with the power to limit judicial discretion could ensure that sentences were appropriately severe—"proportional" to the gravity of the offense and responsive to the perceived need to fight crime.

Liberals were also worried about sentencing severity, although their concern tended to focus on the danger of excessive severity, not leniency. During the 1970s, state and federal legislatures began to enact statutes that directly limited judicial discretion. The California legislature, to take one notable example, abolished indeterminate sentencing and instead set in place a complex system of determinate legislative sentences.[22] To

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19. For example, Senator Edward Kennedy, one of the leading liberal proponents of reform in the Senate, relied on several empirical studies of sentencing disparity to justify reform prior to the enactment of the SRA. See Edward M. Kennedy, Toward a New System of Criminal Sentencing: Law With Order, 16 Am. Crim. L. Rev. 353, 357-359 (1979) (discussing studies). See also Edward M. Kennedy, Foreword to O' Donnell, Churgin and Curtis, Toward a Just and Effective Sentencing System, at viii (1977).

20. See Alan M. Dershowitz, Let the Punishment Fit the Crime, N.Y. Times, Dec. 28, 1975, Magazine Section, at 7 ("[I]t seems that the day of the indeterminate sentence is passing—and with few regrets. While law-and-order conservatives remain persuaded that indeterminate sentencing is just one more form of coddling criminals, prisoners and their defenders outside the walls are complaining that it has resulted in too much power for parole boards and longer stays in prison . . . . In short, a surprising consensus is emerging around the idea that it is time for a return to uniformity in sentencing.").

21. See Nagel, supra note 15, at 884 (citing polls showing that, "on the whole, sentences served were considerably and consistently more lenient than public estimates of what ought to be the normative societal response").

22. See generally Sheldon L. Messinger & Philip E. Johnson, California's Determinate Sentencing Statute: History and Issues (1977), reprinted in Franklin Zimring & Richard Frase, The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law 950-87 (1980) (discussing

liberal reformers, the result was an excessively harsh and complex sentencing system. Thus, many saw California's reform movement in the 1970s as a portent of the dangers of legislative sentencing.[23] Indeed, by the early 1980s, the U.S. Congress itself began to discuss more seriously the enactment of mandatory sentences.[24]

Liberal reformers could see the writing on the wall: If something wasn't done to constrain judges effectively, Congress would inevitably enter the fray. Some liberal reformers imagined that a politically insulated administrative agency could limit judicial discretion, while also serving as a moderating influence on legislative activities in the sentencing field—a kind of bulwark against the growing tough-on-crime movement spreading across the nation.

In short, two major issues attracted the attention of reformers on the left and right. For want of better terms, they might be called the issues of sentencing "disparity" and sentencing "severity." Reformers on the left tended to give special emphasis to issues of disparity, and reformers on the right tended to pay particular attention to considerations of sentencing severity. But both policy issues contributed to the growing interest in restructuring the federal sentencing system.

California's sentencing reform movement); Raymond I. Parnas & Michael B. Salerno, The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California, 11 U.C. Davis L. Rev. 29 (1978).

23. See Berman, supra note 3, at 95 ("California's experience with a legislature-centered sentencing system in the late 1970s confirmed for many reformers that crime-wave politics would often lead legislatures to enact an incoherent, uncoordinated and ever-increasing set of sentences."); Von Hirsch, supra note 12, at 5 (discussing problems caused by the California legislature's involvement in sentencing).

24. Congress ultimately enacted mandatory minimum legislation in 1984, 1986 and 1988. U.S. Sentencing Comm'n, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 9-10 (1991) (discussing history of federal mandatory minimum statutes) [hereinafter Mandatory Minimum Report].

B. The Sentencing Reform Act

Efforts to change the federal system reached a crescendo in 1984. In that year, liberals and conservatives entered into a marriage of convenience to enact the SRA, which triggered the dramatic restructuring of the sentencing field.[25] Reflecting the bipartisan nature of the effort, the Act's chief sponsors in the Senate were Senators Kennedy and Hatch.[26]

The practical effect of the SRA has been to alter the allocation of institutional authority over sentencing in the federal system. The Act, for one, abolishes parole. Federal sentences are now measured in "real time": Defendants serve their entire sentences (less a limited number of "good time credits").[27] Moreover, the Act dramatically limits

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25. Congressional debates over sentencing reform legislation extended for over a decade. The first proposals to revamp the federal system were introduced in 1973, and Senator Kennedy offered a proposal to enact sentencing guidelines as early as 1976. See Nagel, supra note 15, at 900. The Senate Judiciary Committee published a lengthy report—S.Rep.225—to accompany the bills that led to the SRA. S.Rep. No. 98-225 [hereinafter Senate Report]. This report is widely seen as "the central document in the legislative history of the Sentencing Reform Act." Marc Miller, supra note 3, at 425. See also Berman, supra note 3, at 37.

26. The sentencing legislation eventually passed the Senate by vote of 91-1. See 130 Cong. Rec. 1587 (1984). Although the House legislation was also sponsored by a bipartisan group of Representatives, opposition emerged from liberal members of the House Judiciary Commission, who tried to block the sentencing measure from coming to the floor for a vote. The opposition succeeded for some time, but House leadership ultimately brought the bill to the floor as a rider to a separate piece of legislation. That package passed by a vote of 316-91. See 130 Cong. Rec. 26,835, 26,837-38 (1984).

27. The elimination of parole was not without controversy. Some commentators saw the parole board as a useful institution for reducing disparity at the federal level. In an attempt to ensure greater consistency in its decisions, the parole board developed its own guidelines for determining when to release offenders. The parole guidelines served as a model for the Commission's subsequent sentencing guidelines.

Nonetheless, Congress ultimately concluded that the parole board could not successfully address disparity at the federal level. The Senate Report observed that judges had the ability, in setting the initial sentence, to influence the timing of parole in many cases. See Senate Report, supra note 25, at 112. As a result, many judges "second guessed" parole boards when setting punishment levels in order to ensure a desired release date. The result undermined parole board efforts to reduce disparity. See id. at 113 ("[J]udges are attempting to apply their

judicial discretion, principally by adopting Judge Frankel's idea of an expert agency with responsibility over sentencing policy. Under the Act, the U.S. Sentencing Commission has the authority to enact guidelines to restrict judicial discretion at sentencing.[28]

Not surprisingly, the specific text of the Sentencing Reform Act reflects the policy debates that drove the reform movement in the 1970s and '80s. For example, several provisions of the Act direct the Commission to take steps to eliminate unwarranted sentencing disparity.[29]

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individual sentencing philosophy to control the true sentence of the defendant, while the Parole Commission is attempting to alleviate the resulting disparity.").

28. Several provisions of the SRA ensure that judicial authority over sentencing is sharply circumscribed. First, the SRA limits judicial discretion by requiring the Commission to make guideline ranges relatively narrow. 28 U.S.C. § 994(b)(2) (the upper limit for any given guideline range "shall not exceed the minimum of that range by more than the greater of 25 percent or six months"). Second, the SRA states that the Commission's rules are presumptively binding. Judges can depart from the guideline range, but only in exceptional circumstances. 18 U.S.C. § 3553(b). Third, for the first time under the SRA, sentences are subject to appellate review. Judges must articulate reasons for their choice of a guideline range and for any decision to depart from that range. 18 U.S.C. § 3553(c). Appellate courts can review the decisions to make sure that trial courts apply the guidelines appropriately, and that any departure from the guidelines is justified. 18 U.S.C. § 3742. By contrast, sentences within an appropriately defined sentencing range remain largely insulated from review.

29. See 28 U.S.C. § 991(b)(1) (B) (one purpose of the Sentencing Commission is to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted . . . ."). See also 28 U.S.C. § 994(f) (calling on Commission to pay "particular attention to . . . reducing unwarranted sentencing disparities").

The legislative history repeatedly cites the need to reduce disparity as a rationale for the development of a guideline system. See, e.g., Senate Report, supra note 25, at 51 ("the bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently."); id. at 65 ("the shameful disparity in criminal sentences is a major flaw in the existing criminal justice system"). See also Stephen G. Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. Rep. 180, 180 (1999) ("Congress, acting in bipartisan fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complaints that differences among sentences reflected not simply different offense conduct or different offender history, but the fact that different judges imposed the sentences. . . .); Miller, supra note 3, at 423 ("The goals of avoiding unwarranted disparity and seeking greater honesty are evident in the major structural components of the Act: The

Section 994(m) of the Act also commands the Commission to reassess the severity of sentences, observing that "in many cases, current sentences do not accurately reflect the seriousness of the offense."[30]

Section 994(m) is sometimes cited as evidence that Congress intended for the Commission to increase the severity of punishment from pre-Guideline levels.[31] However, the text is ambiguous: It does not state whether the sentences are seen as too harsh or too lenient, let alone how the sentences should be changed. The legislative history, moreover, suggests that Congress expected the Commission to raise some sentences and lower others.[32] In

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creation of a Sentencing Commission to issue guidelines for judges and the abolition of the U.S. Parole Commission.").

30. 28 U.S.C. § 994(m).

31. See, e.g. Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 268 (1993) (citing language of § 994(m) as illustration of statutory provisions that encouraged the Commission "to set guidelines that would result in more persons being imprisoned for longer prison terms."); Joseph W. Luby, Reigning in the Junior Varsity Congress: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines, 77 Wash. U. L.Q. 1199, 1207 n.61 (1999) (similar).

The Commission itself seemed to make this assumption when, in a report to Congress, the agency suggested that one of the principal "goals of the Sentencing Reform Act [was to] . . . correct past patterns of undue leniency for certain categories of offenses." Mandatory Minimum Report, supra note 24, at ii (1991). Marc Miller observed that this statement "marks the first time that the Commission has included the goal of increasing past sentences as a general aim of its work." Miller, supra note 3, at 447 n.144.

32. See, e.g., Senate Report, supra note 25, at 116 (sentences might be too high in some cases and too low in others); id. at 61 ("The Committee is of the view that the Sentencing Commission will probably find, for example, that the sentences for some violent offenders are too low and that the sentences for some property offenders are too high to serve the purposes of punishment."). See also Kenneth R. Feinberg, The Federal Guidelines and the Underlying Purposes of Sentencing, 3 Fed. Sent. Rep. 326, 326 (1991) (citing "[r]eferences in the Senate Report to the need to curtail harsh sentencing and promote rehabilitative programs"); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1706 (1992) ("In enacting the SRA, Congress clearly sought to increase the level of imprisonment for certain crimes. . . . At the same time, however, Congress also sought to reduce unnecessary imprisonment in other kinds of cases.").

When the language that became § 994(m) was first proposed in a 1982 amendment, Senator Mathias expressed concern that the provision would result in longer sentences, but "Senator Biden reaffirmed his understanding that the

this respect, the language mirrors the disagreement between liberals and conservatives over whether prior sentences were sufficiently strict. Congress ultimately looked to the Commission to exercise its discretion in assessing whether sanctions should be increased or decreased from past practice.[33]

II. SENTENCING REFORM AND THE PURPOSES OF PUNISHMENT

The SRA dramatically restructured the federal sentencing system. For the first time at the federal level, an expert agency rather than the judiciary would be principally responsible for making punishment decisions. But the SRA did not simply create a change in the institutional mechanism for sentencing. It also marked a *philosophical* change as well. Beyond directing the Commission to eliminate sentencing disparities and reconsider sentencing levels, the Congress also called on the Commission to enact guidelines that were based on designated "purposes of punishment."[34] And it called on the courts to observe those purposes when making specific sentencing decisions.

The permissible purposes are listed in 18 U.S.C. § 3553(a)(2). There, Congress declared, punishment should be imposed:

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sentencing reform bill would not increase the average length of prison sentences," presumably because some sentences would be reduced to compensate for any sentence increases. See 128 Cong. Rec. 26, 539-41 (1982) (Unprinted Amendment No. 1356), cited in Stith & Koh, supra note 31, at 268 n.280.

33. Mistretta, 488 U.S. at 677-78 ("We cannot dispute . . . that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes . . . . The Commission also has significant discretion to determine which crimes have been punished too leniently and which too severely. Congress has called upon the Commission to exercise its judgment about which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing.").

34. 28 U.S.C. § 991(b)(1)(A) instructs the Sentencing Commission to establish sentencing policies and practices "that assure the meeting of the purposes of sentencing as set forth in Section 3553(a)(2) of Title 18. . . ."

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant;
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[35]

These four purposes resemble the traditional purposes of punishment discussed by criminal theorists.[36] According to the Senate Report on the SRA, the first purpose is "essentially the 'just deserts' concept" of punishment,[37] which is the most influential theory of retribution today. The last three resemble the goals of deterrence, incapacitation, and rehabilitation, respectively.[38]

Several provisions of the code use mandatory language to emphasize the importance of grounding sentencing decisions on the traditional purposes of punishment. Section 994(a)(2) states that: "The Commission *shall* promulgate ... general policy statements regarding application of the guidelines or any other aspect of

35. 18 U.S.C. § 3553(a)(2). See also 18 U.S.C. § 3551(a) (the defendant "shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in ... 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.").

36. See Nagel, supra note 15, at 887 ("Generally, four purposes of sentencing have found widespread acceptance: punishment, deterrence, incapacitation, and rehabilitation. Throughout history, societies have assigned differing priorities to these four goals in accordance with the prevailing philosophies and beliefs of their day."); Miller, supra note 3, at 480 ("there is broad agreement on a fairly short list of standard purposes from which whole systems and particular sentences may be built."); Jeffrey S. Parker & Michael K. Block, The Limits of Federal Criminal Sentencing Policy; Or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001, 1008 (2001) ("All of the statutory sentencing purposes set forth in the Act were traditional ideas that had been developed extensively in the previous literature on criminal punishment.").

37. Senate Report, supra note 25, at 75.

38. The Senate Report spells this out in detail. Senate Report, supra note 25, at 76 (the "second purpose of sentencing is to deter others from committing the offense .... The third purpose is to protect the public from further crimes from of the defendant .... The fourth purpose is to provide rehabilitation.").

sentencing . . . that in the view of the Commission would further the purposes" of punishment outlined in the Act.[39] Section 994(m) states that: "the Commission *shall* independently develop a sentencing range that is consistent with the purposes of sentencing. . . ."[40] Section 991(b) establishes the overriding "purposes" of the Commission, which include "assur[ing] the meeting of the purposes of sentencing" identified in the Act.[41] The legislative history emphasizes the importance of punishment purposes, affirming the Commission's obligation to ensure that its guideline decisions are grounded in the stated sentencing objectives.[42]

Why did Congress impose this command? What did it seek to achieve by requiring the Commission to ground its decisions on sentencing purposes? One answer is that the Congress understood that sentencing purposes were implicit in any justified sentencing decision. To say that a given sentencing rule is justified is to say that it serves some good purpose. The purposes represent the value or benefit of a given punishment decision.[43] Thus, by requiring the Commission to base its guidelines on the purposes of punishment, Congress simply required the agency to justify its sentencing decisions in a deliberate and reflective manner.

Although this conception of purposes seems straightforward, the precise role that purposes play in the

39. 28 U.S.C. § 994(a)(2) (emphasis added).

40. 28 U.S.C. § 994(m) (emphasis added).

41. 28 U.S.C. § 991(b)(1)(A). Section 994(f) further adds that "the Commission, in promulgating guidelines . . . *shall* promote the purposes set forth in section 991(b)(1)." 28 U.S.C. § 994(f) (emphasis added). See also 28 U.S.C. § 991(b)(2) (further purpose of the Commission is to "develop means of measuring the degree to which different sentencing . . . practices are effective in meeting the purposes of sentencing" listed in the Act.).

42. See, e.g., Senate Report, supra note 25, at 181 ("The section reflects the broad responsibility imposed upon the Commission to assure that sentencing and the administration of sentences fulfill the purposes of sentencing."); id. at 66 (sentences must "achieve the general purposes of sentencing"); id. at 169 ("the Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing.").

43. Miller, supra note 3, at 477 ("Congress chose to make sentencing purposes the foundation and measure of the new system.").

sentencing process is often misunderstood. The following sections address three essential questions about that role, concerning the nature, policy-implications, and prioritization of the purposes of punishment.

First, what is the nature of these purposes (*i.e.* what sort of justifying standards are they)? Second, what is the relationship between these purposes and the policy goals of the SRA (*i.e.* are the purposes and policy goals distinct requirements, or are they somehow related)? Third, what is the relationship among the different purposes of punishment themselves (*i.e.* are the purposes consistent with each other, or must choices be made among them)? These three questions are considered, in turn, below.

A. Moral Principle and the Nature of Sentencing Purposes

A common misconception about the purposes of punishment concerns their role in justifying sentencing decisions. To say that a purpose of punishment helps to justify a punishment decision is correct, but misleading. The purposes of punishment are not justifying standards themselves, nor have they typically been characterized that way by criminal theorists. Rather, they are facets of broader theories of justification.

To understand this seemingly mysterious point, consider the purpose of "incapacitation." To say that a given sentence "incapacitates" does not necessarily mean that the sentence is justified, even for one who believes that incapacitation is the primary (or even sole) purpose of punishment. For example, a defendant's crime might be so minor that incapacitation might seem unnecessary and wasteful under the circumstances. In this sense, incapacitation does not itself justify. Rather, as Kyron Huigens explains, whether any of the traditional purposes "justify punishment . . . depends on whether a broader moral or ethical theory gives it a justifying effect."[44]

44. Kyron Huigens, Rethinking the Penalty Phase, 32 Ariz. St. L.J. 1195, 1196 (2000).

Moral theories, after all, are theories about what justifies.[45] Thus, it is the moral theory that provide the justification, while the purposes of punishment constitute considerations relevant to those moral theories. A full understanding of sentencing purposes, therefore, requires insight into the moral principles that give those purposes meaning.

Which moral theories lie implicit in the purposes listed in the SRA? No definite answer to that question exists. Conceivably, one might come up with a range of different moral theories to explain the relevance of the various purposes listed in section 3553(a)(2). In practice, however, the purposes are generally considered to be manifestations of two moral theories, reflecting two major streams of moral thought in Western culture.[46]

1. Utilitarianism

The first of these traditions is "consequentialism," of which utilitarianism is the most common form (indeed, I will use the terms consequentialism and utilitarianism interchangeably).[47] Although utilitarian theories vary, all tend to affirm that punishment is justified so long as it

45. Moral principles are justifying standards: They offer a reason or rationale why certain ends should be pursued. See, e.g., Kent Greenawalt, Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law, 36 Cath. U. L. Rev. 1, 8 (1986) ("Roughly, we can speak of moral theories as including both ultimate justifying principles and practical rules or guides to conduct."). Moral principles thus offer a rationale for imposing punishment on individual citizens.

46. See Huigens, supra note 44, at 1196 ("[T]heories of punishment are properly distinguished and named according to their underlying ethical theories. Consequentialism stresses the justifying effects of deterrence . . . and deontological morality stresses the unique justification provided by retribution.").

47. Utilitarianism is a consequentialist theory that holds that the measure of good consequences is "utility." Utilitarians themselves differ on the definition of utility. For example, hedonistic utilitarians view pleasure and pain as the sole determinants of human welfare. Aristotelian utilitarians adopt an objective measure of the good as the measure of human welfare. For a discussion of utilitarianism in justifying punishment, see Nicola Lacey, State Punishment 27 (1988).

promotes the "public welfare."[48] Assessing whether punishment promotes the public welfare requires a balancing of considerations, since punishment usually has both good and bad consequences for society.

The bad consequences might involve the financial costs to society in carrying out the sanction or include the harm imposed on the defendant himself.[49] The good consequences can be equally varied, but typically emphasize the crime-fighting effects of punishment. Indeed, many commentators treat "crime control" as a virtual synonym for utilitarianism, probably because they see it as the chief utilitarian benefit.[50] Three of the purposes listed in the SRA—incapacitation, general deterrence, and rehabilitation—can be treated as benefits in this sense (*i.e.,* ways that punishment promotes human welfare by reducing crime).[51] Since punishment has both

48. See Huigens, supra note 44, at 1206 n.45 ("Under a consequentialist theory of punishment, the criminal law's system of prohibitions is morally justified as a whole by virtue of its optimizing social welfare.").

49. Conceivably, punishment might benefit—rather than harm—a given defendant. For example, certain offenders might gain valuable skills in prison, or find the discipline of prison life helpful. The SRA, however, states that individuals should not be sentenced to prison because of a belief that it will be "good" for them. See 18 U.S.C. § 3582(a). That limitation reflects Congress's skepticism about the ability of public officials to determine when or how to rehabilitate offenders in prison.

This distrust of government's ability to identify what is "good" for the individual, at least in the case of a prison sentence, is consistent with a general presumption, deeply rooted in American society, that the individual is the best judge of his or her own long term interests. For extended discussion of this presumption, see Aaron J. Rappaport, Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy, 2001 Utah L. Rev. 441, 460-64.

50. Some commentators use the terms "crime control," "efficiency" and "utilitarianism" nearly interchangeably. See, e.g., Parker & Block, supra note 36, at 1010 (embracing goal of efficiency "in the fairly strict utilitarian or economic sense"). See Supplementary Report, supra note 14, at 15-16 (discussing "philosophy of crime control" and noting that defendants sentenced under this scheme "should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant").

51. Parker & Block, supra note 36 at 1008 ("[A]t least three of the four purposes—deterrence, incapacitation, and rehabilitation—easily could be harmonized as alternative means toward the same end of harm prevention, or, in the synonym suggested by the title of the more general legislation of which the Sentencing Reform Act was part, as 'crime control.'"). See also Senate Report,

good and bad consequences for human welfare, utilitarians must determine whether the benefits of a given sanction exceed its costs. Punishment is justified only if it generates a net gain in public welfare.

2. Retribution

The second great moral tradition is an anti-consequentialist, or "deontological," approach. This moral tradition rejects the idea that conduct can be justified based on its consequences for society. Rather, and speaking roughly for now, conduct is justified based on some inherent moral quality of the act or actor.

There are, of course, many variants of retribution, but the most common today is called "just deserts."[52] Although just desert theories themselves come in many flavors, almost all hold that punishment is justified based on the defendant's inherent culpability, regardless of utilitarian concerns about social consequences.[53] The legislative

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supra note 25, at 76 (defining incapacitation, general deterrence, and rehabilitation).

This explains a notable feature of the Commission's Supplementary Report, supra note 14. The report makes only passing reference to the purposes of deterrence, incapacitation or rehabilitation. None are mentioned under the heading "Major Legislative Purposes of Sentencing Reform Legislation." See Miller, supra note 3, at 448 n.148. Rather, the Commission repeatedly speaks of utilitarian (or "crime control") goals as one of the two major goals of the sentencing decision (with just deserts as the other). As I have suggested, the Commission's approach makes sense if deterrence, incapacitation, and rehabilitation are understood as aspects of utilitarian thinking. Indeed, at points in its discussion, the Commission itself acknowledges that incapacitation and deterrence are both means of promoting crime control goals. See, e.g., Supplementary Report, supra note 14, at 14 n.55.

52. See Huigens, supra note 44, at 1246 n.200 (discussing various interpretations of retributive thinking).

53. See, e.g., Lacey, supra note 47, at 18; Nagel, supra note 15, at 898 (just desert theorists "argue that those who violate the rights of others deserve only to be punished in accordance with their individual level of blameworthiness."). Retributionists often draw upon Kant's moral theory as a basis for their arguments regarding punishment. See Huigens, supra note 44, at 1241 ("Kantian deontology . . . has never ceased to play a major role in the theory of punishment."); Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1667 (1992) (relying on Kant to support retributive theory of punishment).

history of the SRA suggests that this is one of the principal ways Congress conceived of the "just punishment" function of punishment: "it is another way of saying that the sentence should reflect the gravity of the defendant's conduct."[54] Among desert theorists, culpability is usually measured along two dimensions—the blameworthiness of the defendant's mental state and the harm caused by the conduct.[55]

In truth, one can not be sure that Congress intended to use the term just punishment (or just deserts) in a way fully consistent with the term's typical usage among criminal theorists. For example, the Senate Judiciary Committee appears at times to suggest that "just punishment" should take into account utilitarian considerations of social welfare, such as issues relating to "the public interest in preventing recurrence of the offense. . . ."[56] That would be inconsistent with the view that just deserts is a deontological theory of punishment, one that ignores consideration of consequences.

This highlights a cautionary point when discussing the purposes of punishment. In this discussion I have been assuming that the purposes of punishment are employed in ways consistent with their traditional usage in the criminal justice literature. That may not be true in all cases. Many of the terms used—such as "just deserts"—are so vague and have so many different nuances—that it is a mistake to imagine that Congress itself had an absolutely clear idea of what the terms meant in practice. That ambiguity means

54. See Senate Report, supra note 25, at 75.

55. Lacey, supra note 47, at 18 ("Culpability is generally explained as a function of the gravity of the harm caused . . . combined with the degree of responsibility (intent, recklessness, negligence, or mere inadvertence) of the actor."). See also Supplementary Report, supra note 14, at 15 (for just desert theories, "punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less blameworthy, he should receive less punishment, regardless of the danger that he may pose to the public and the need to deter others from committing similar acts."); Senate Report, supra note 25, at 75-76 ("[T]he sentence should reflect the gravity of the offense. From the public's standpoint, the sentence should be of the type and length that will adequately reflect, among other things, the harm done or threatened by the offense . . . .").

56. Senate Report, supra note 25, at 75 n.162, and accompanying text.

that the Commission has broad discretion in deciding which values it means to promote when it promulgates its guideline decisions.

In sum, Congress sought to rationalize the federal sentencing system, and it looked to the Commission to accomplish this task.[57] The effort required the Commission to justify its decisions in terms of sentencing purposes, and ultimately in terms of their underlying moral theories.[58] Congress understood, in other words, that punishment requires moral justification, and that the Commission would exercise moral judgment in reforming the federal sentencing system.[59]

B. The Inseparability of Policy Goals and Punishment Purposes

A second misconception regarding sentencing purposes concerns their relationship to the policy goals of the SRA. Some observers tend to speak of the SRA's philosophical mandate—to ground punishment on moral purposes—as the central objective of the SRA; indeed, even more fundamental than the Act's policy objectives.[60] There is some support for this view in the text and legislative history of the Act, both of which emphasize the critical role

57. See, e.g., U.S. Sentencing Guidelines Manual, Ch. 1.A.2 (2001) ("The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.") [hereinafter U.S.S.G.]; Mandatory Minimum Report, supra note 24, at 15 ("The Sentencing Reform Act of 1984 called on the President to appoint an expert . . . bipartisan Commission to create sentencing guidelines that would effectively and rationally channel the sentencing discretion of the federal courts.").

58. See Senate Report, supra note 25, at 51 (The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity . . . to assure that the sentences imposed are consistent with the purposes of sentencing.").

59. Congress even expected the Commission to undertake research on the various sentencing theories. See id. at 160 (describing anticipated work of the Commission as including "basic research on sentencing theories as well as applied research on the effectiveness of certain policies. . . .").

60. See Paul H. Robinson, A Sentencing System for the 21st Century?, 66 Tex. L. Rev. 1, 8 (1987) (criticizing tendency of policymakers to treat "uniformity" as a "goal in and of itself, apart from satisfying the purposes of sentencing").

that purposes play in the new sentencing scheme.[61] Other commentators suggest that one or another policy goal is the Commission's "primary goal."[62] Again, significant support in the text and legislative history of the Act exists to support this position, as well.[63]

Ultimately, however, it is misleading to speak of the SRA's purposes requirement as being more or less important than the agency's policy goals. Such a view implies that the projects are somehow distinct and unrelated. A more accurate view is that the purposes of

61. See, e.g., Senate Report, supra note 25, at 161-62 (when the Senate Report describes the "basic purpose of the Sentencing Commission" it speaks primarily about the goal of grounding guideline decisions in purposes of punishment). See also id. at 168, 169, 175 (emphasizing purposes as focal point). See generally Berman, supra note 3, at 37 ("Congress's overriding interest in establishing a principled and purpose-driven sentencing system is clear from the Act's many references to the purposes of sentencing and from the Senate Report's emphasis. . ."). Cf. Miller, supra note 3, at 466-67 (noting that the SRA refers to sentencing purposes 18 times when speaking about the responsibilities of the Commission and sentencing judges); Freed, supra 31, at 1708 (similar).

62. Typically, the goal of reducing disparity is viewed as paramount. See, e.g., Administrative Office of United States Courts, Memorandum Opinion of the General Counsel's Office, 8 Fed. Sent. Rep. 110, 112 (1995) ("It is clear that, because of [past] Federal sentencing practices, the primary goal of the SRA was the elimination of unwarranted disparity, and one can find numerous references to this in the Act."); Cheryl Q. Bader and David S. Douglas, Where to Draw the Guideline: Factoring the Fruits of Illegal Searches Into Sentencing Guidelines Calculations, 7 Touro L. Rev. 1, 3 n.7 (1990). ("[t]he primary purpose of the Sentencing Reform Act and the sentencing guidelines is to bring about equality of punishment, so that similarly situated defendants convicted of similar offenses are similarly punished.").

63. See, e.g., 28 U.S.C. § 991(b)(1)(B) (1994) ("The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ."); Senate Report, supra note 25, at 65 ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."). See also United States v. Koon, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice."); U.S. Sentencing Commission, Staff Simplification Draft Paper, Departures and Offender Characteristics 4 (1994) ("The reduction of unwarranted disparity was a very high priority for Congress in enacting the SRA—arguably the highest. References to the goal of reducing disparity are scattered throughout the Senate Report.").

punishment lie implicit in any effort to achieve the Commission's policy objectives of recalibrating sentencing severity or reducing sentencing disparity.

The link between sentencing purposes and sentencing *severity* is relatively straightforward. In the SRA, Congress charged the Commission with developing sentencing levels that were justified.[64] Needless to say, such an effort presupposes some standard for evaluating what counts as a justified sentence. As we have seen, Congress identified the traditional purposes of punishment—and, by implication, their associated moral theories—as the relevant standards of justification. Thus, some assumption about sentencing purposes lie implicit in any reflective severity decision.

The link between purposes and sentencing *disparity* is less patent. Indeed, some commentators appear to accept the idea that disparity can be reduced without taking a stand on sentencing purposes. The Commission itself has adopted such a perspective, affirming that the guidelines can reduce sentencing disparity, even absent a clear statement of purposes.[65] One has the sense that the Commission has made the reduction of disparity such a

64. The idea that punishment requires a justification is widely shared. See Miller, supra note 3, at 414 ("Criminal sentences are both the culmination of the criminal justice system and the implementation of enormous state power over individuals. It should be unobjectionable, therefore, to assert that sentences ought to have a clearly articulated purpose (or purposes)."); See Markus Dirk Dubber, Recidivist Statutes As Arational Punishment, 43 Buff. L. Rev. 689, 693 (1995) (asserting that state infliction of punishment calls out for a justification).

65. The Commission's overriding aspiration to reduce sentencing disparity is clear from its reports and guideline manuals. See, e.g., Supplementary Report, supra note 14, at 8 (Eliminating unwarranted disparity was the "unifying theme, more than any other, [and it] endured through the long period of academic and legislative debate and brought together strong advocates of divergent political philosophies."). See also William W. Wilkins, Jr. & John R. Steer, The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity, 50 Wash & Lee L. Rev. 63, 87 (1993) ("No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants."); Miller, supra note 3, at 419 n.14-15 and accompanying text (citing claims that the Commission focused on disparity goals most of all).

central part of its mission precisely *because* it offers a way to avoid taking a stand on moral principle.

The Commission's superficially appealing view, however, is profoundly mistaken—for the simple reason that any attempt to speak about disparity implicitly relies on purposes of punishment.[66] To see this point, one need only consider the nature of sentencing disparity itself.

Imposing disparate penalties on two different offenders is not problematic in all cases. Sometimes two offenders warrant different penalties because, for example, they committed different crimes or had different criminal records. Congress was concerned only about "unwarranted" sentencing disparity,[67] which refers to the idea that *similarly situated* offenders receive dissimilar sentences.[68]

To say that two offenders are similarly situated is certainly not to say that they are alike in all respects. Two offenders who have different hair color would still be viewed by most people as similarly situated for punishment purposes, so long as they otherwise committed the same offense and had the same prior record and background. Hair color, in short, is not a significant distinction. Different criminal records, however, might be. What standard tells us which factors about a person are significant in making punishment decisions?

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66. Other theorists have made similar points. See, e.g., Miller, supra note 3, at 424.

67. See Senate Report, supra note 25, at 161 ("[T]he policies and practices are required to avoid 'unwarranted sentence disparities' . . . . The key word . . . is 'unwarranted.' The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants with respect to those factors.").

68. See, e.g., Nagel, supra note 15, at 933 ("The term disparity, in the sentencing context, is generally used to refer to a pattern of unlike sentences for like offenders."). See Wilkins & Steer, supra note 65, at 87 (1993) (Commission goal is to reduce "unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants"). Unwarranted disparity also exists when *dissimilarly* situated offenders receive the *same* sentence.

The answer, of course, is the purposes of punishment. Hair color is not a significant distinction because being red-haired or brown-haired is not relevant to promoting any legitimate purpose of punishment. But a criminal record might be a relevant consideration—depending on one's moral principles. For example, a utilitarian might deem a criminal record a relevant factor for incapacitative purposes, since it helps to identify which offenders are more likely to reoffend and, hence, which pose a greater danger to society.[69] For this reason, it might make sense for a utilitarian to view criminal history as a significant consideration in assessing whether two offenders should receive the same punishment.

The point is that judgments about unwarranted disparity rest on a judgment about which offenders are similarly situated, which in turn requires some assumption about the moral purpose of punishment.[70] Kevin Cole has

69. See Julian V. Roberts, 22 Crime & Just. 303, 316-17 (1997) ("Research on the prediction of criminal behavior repeatedly demonstrated criminal record to be the single best predictor of future offending"). S. Gottfredson & D. Gottfredson, Accuracy of Prediction Models, in 2 Criminal Careers and "Career Criminals" 239-40 (Alfred Blumstein et al. eds., 1986) ("From the earliest studies to the last, indices of prior criminal conduct consistently are found to be among the most powerful predictors"); Andrew von Hirsch, Desert and Previous Convictions, in Principled Sentencing 191 (Andrew von Hirsch & Andrew Ashworth eds., 1998) ("[P]rediction studies tend to show that the statistical likelihood of someone's re-offending is influenced primarily by his previous criminal history. . . .").

70. See Alschuler, supra note 7, at 918 ("Every empirical effort to measure disparity rests implicitly on a normative concept of appropriate sentencing criteria."). As Alschuler himself points out, the Commission has not always appreciated this fact. Perhaps the most obvious illustration of the Commission's confusion on this point is its 1991 Report to Congress on sentencing disparity. See U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guideline System and Short-Term Impact on Disparity on Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining (1991).

In that study, the Commission concluded that unwarranted sentencing disparity had been significantly reduced under the sentencing guidelines because judges sentenced within the specified guideline rules in the vast majority of cases (and, hence, departed from the Guidelines in few cases). But the rate of departure tells us nothing about the degree of disparity; departures might be necessary to take into account relevant distinctions among offenders in light of punishment purposes. Similarly, the fact that most offenders are sentenced within the guideline range does not mean that disparities have been eliminated

made this precise point, in saying that the concept of disparity "requires a coherent underlying theory of punishment, because disparity is not a self-defining concept."[71]

In assessing which offenders are similarly situated, the Commission has been left largely to its own devices. To be sure, the SRA states that offense seriousness and an offender's criminal record are two central factors in the sentencing determination.[72] However, the Commission has broad discretion to determine precisely how those factors should be taken into account in the guideline system.[73] The SRA also grants the Commission significant discretion to determine whether and how other factors, such as an offender's age, physical condition, or role in the offense, should be incorporated into the guidelines.[74]

In short, efforts to assess the proper severity of punishment and to reduce sentencing disparities rely implicitly on some conception of sentencing purposes.[75] In

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for these offenders. For all we know, the guideline rules failed to take account of factors that would distinguish among the offenders more accurately. For further discussion of Commission's confusion relating to the meaning of "disparity," see Steve Y. Koh, Reestablishing the Federal Judge's Role in Sentencing, 101 Yale L.J. 1109, 1126 (1992).

71. Kevin Cole, The Federal Sentencing Guidelines: Ten Years Later: The Empty Idea of Sentencing Disparity, 91 Nw. U.L. Rev. 1336 (1997). Cole's article draws upon Peter Westen's writings on equality. See, e.g., Peter Westen, The Meaning of Equality in Law, Science, Math, and Morals: A Reply, 81 Mich. L. Rev. 604, 629 (1983) (individuals "talk about prescriptive equality and inequality—as everyone must—by implicit reference to anterior prescriptive standards of comparison; but by neglecting the logic of equality they conceal from themselves and their audience the substantive content of the prescriptive standards they implicitly incorporate by reference."); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

72. Senate Report, supra note 25, at 161 (the statute "establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity that should be avoided unless it is warranted by other factors.") (discussing 28 U.S.C. § 991(b)(1)(B)).

73. In a forthcoming paper, I outline how different purposes of punishment have different ramifications for the construction of the criminal history and offense seriousness guidelines. See Rappaport, supra note 8.

74. See 28 U.S.C. § 994(d).

75. Some commentators have suggested that the two policy goals are in

this sense, the Commission's obligation to ground its decisions on punishment purposes is not a dramatic change in the sentencing process. It simply requires the Commission to make explicit what should have been implicit already in the sentencing decision. The SRA's drafters likely understood this point, which explains why they made punishment purposes so central in the new sentencing scheme.

C. *Conflicts among Punishment Purposes*

A final misconception about sentencing purposes is the view that the various theories of punishment justify the same sentencing rules. The original Commission explained its refusal to prioritize the purposes of punishment on this ground. As the Commission stated, the choice of a favored purpose was "more symbolic than pragmatic. In practice, the different philosophies are generally consistent with the same result."[76]

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tension, that the goal of reducing sentencing disparity (i.e. achieving greater sentencing "uniformity") conflicts with the goal of recalibrating sentencing severity (i.e. making sentencing "proportionate"). See, e.g., Nagel, supra note 15, at 920 n.207, 932 & 935 (speaking of tension between "uniformity and proportionality").

This view, however, reflects confusion about the meaning of uniformity and proportionality, at least if those terms are used to embody worthy sentencing goals. Uniformity describes the ideal where similarly situated offenders are treated similarly in light of the governing purposes of punishment. Proportionality describes the ideal where each offender receives a justified sentence, based on governing purposes of punishment. Both goals are met, in short, when penalties are properly grounded on punishment purposes. Where offenders receive punishment in accordance with sentencing purposes, similarly situated offenders will be treated alike, and individual offenders will receive proportionate penalties. Thus, appropriately defined, uniformity and proportionality are not *necessarily* in conflict.

76. See Supplementary Report, supra note 14, at 16. See also Nagel, supra note 15, at 914 & n.190; 916-17 n.197. Whether the Commission actually believed this statement to be true is debatable. As discussed below, when the commissioners began to develop the guidelines, they debated whether utilitarianism or retribution should drive the guideline structure. At that time, the commissioners appeared to believe that the choice of philosophies mattered very much. Nonetheless, for various pragmatic reasons discussed below, the Commission ultimately decided against adopting a single dominant purpose as the governing philosophy of the guidelines.

There is an obvious appeal to the idea of a "harmony of purposes," since it means that choosing a favored sentencing purpose is unnecessary. But it is also a surprising claim, given the longstanding battle between retributive and utilitarian theorists about the primary purpose of punishment.[77] For the participants in that debate, the choice of sentencing theory is anything but academic. More to the point, even a casual look at the agency's rulemaking makes clear that the theorists have something to argue about—for the choice of sentencing philosophy can make a significant difference in both the *severity* and the *structure* of the sentencing system.[78]

Consider a straightforward severity issue. Suppose that the rate of some crime—say a type of white collar crime—has increased dramatically over the past year. Is this a basis for increasing punishment? A just desert theorist would likely say no. The prevalence of a given crime is not typically viewed as relevant in measuring the culpability of the individual offender, so it should not affect the ultimate sentence. But a utilitarian might have an argument for increasing sentences, at least to the extent that the higher crime rates argue for raising sentences to

77. The Commission was certainly aware of this debate. During hearings before the initial Commission, commentators supporting utilitarian and retributive theories of punishment tried to persuade the Commission to adopt their favored positions. See Supplementary Report, supra note 14, at 16.

78. Numerous guideline commentators have noted that sentencing purposes are sometimes in conflict. See, e.g., Stanley A. Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 99 (1988) (the SRA "simply enumerates the several, often conflicting, purposes of punishment"); Julie R. O'Sullivan, The Federal Sentencing Guidelines: Ten Years Later: In Defense of the U.S. Sentencing Guidelines' Modified Real-offense System, 91 Nw. U. L. Rev. 1342, 1362 (1997) ("[B]y mandating that the Commission pursue multiple sentencing goals, Congress presented the Commission with the unenviable task of attempting to craft sentences in cases or categories of cases in which different goals may dictate conflicting results."); Freed, supra note 32, at 1708 (arguing that choice of purposes matter, and that "[d]iscerning the appropriate purpose of sentencing has often been a critical decision for choosing between widely varying sentences."). For an earlier statement to the same effect, see Roscoe Pound, Criminal Justice and the American City, in Criminal Justice in Cleveland 576 (Roscoe Pound & Felix Frankfurter eds., 1922) (noting "fundamental conflict with respect to aims and purposes" of punishment theory).

achieve a greater deterrent effect. Here is a situation where the Commission has no alternative but to make a choice among conflicting sentencing purposes.

Needless to say, the SRA's legislative history anticipates that the Commission would face a conflict of this sort. The Senate Judiciary Committee noted that, where the rate of a certain crime rises dramatically, "an increase in the guideline sentences for the offense" might be justified "in order to deter others from committing the offense."[79] The Judiciary Committee did not direct the Commission to increase sentencing severity in these cases; it simply allowed the Commission to do so if the agency concluded that utilitarian considerations were paramount.

Situations where utilitarianism and retribution conflict also arise in assessing the guidelines' "structure"—that is, in assessing which offense or offender *factors* are relevant for the sentencing decision.[80] Consider, for example, the relevance of an offender's drug addiction to the sentencing decision.

The SRA specifically directs the Commission to consider the relevance of addiction.[81] In response, the Commission has issued rules indicating that physical impairment—including drug dependence—is "not ordinarily relevant" in the sentencing decision.[82] That is to say, the factor is only relevant in "exceptional circumstances." The question of what counts as an

79. Senate Report, supra note 25, at 171. See also id. at 92 ("The Committee is also mindful that during a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing. . . . In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations.").

80. These issues are particularly prevalent when the issue is the relevance of a defendant's personal characteristics and background. See O'Sullivan, supra note 78, at 1362 n.90 (conflict among purposes is "especially true where consideration of the offender's personal circumstances yield differing perspectives as to the appropriate penalty to be assessed").

81. See 28 U.S.C. § 994(d)(5).

82. See U.S.S.G § 5H1.4 ("Physical condition [including drug dependence] is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.").

exceptional circumstance is a complex one, which is beyond the scope of this paper. For present purposes, we can assume that the offender in question has an exceptional manifestation of drug addiction. In such a case, is the drug dependence an aggravating or mitigating factor?

The Commission's answer will turn on whether it adopts a retributive or utilitarian approach to punishment. Under a just deserts approach, punishment is imposed upon a defendant based on his blameworthiness for the current offense, which in turn depends at least in part on the defendant's mental culpability.[83] Arguably, drug abuse would serve as a mitigating factor to the extent that it makes the defendant's criminal conduct less than fully rational and voluntary.

From a utilitarian perspective, however, an exceptional history of drug abuse might serve as an *aggravating* factor. After all, heavy drug use is at least one indicator of an offender's propensity to commit crimes.[84] As a result, based on incapacitation considerations alone, one might want to increase penalties for crimes committed by heavy drug users. Again, the implication is that the appropriate sentencing rule turns on the favored purpose of punishment.[85]

In this matter at least, the Commission has made its position clear. The Guidelines state that "[d]rug or alcohol dependence or abuse is not a reason for imposing a sentence *below* the guidelines. Substance abuse is highly

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83. See infra Part II.A.2.

84. See Douglas B. Marlowe, New Voices On The War On Drugs: Effective Strategies For Intervening With Drug Abusing Offenders, 47 Vill. L. Rev. 989, 989-90 (2002) (noting how drug use is a "substantial causative factor in crime and violence"). See also Richard A. Millstein & Alan I. Leshner, The Science of Addiction: Research and Public Health Perspectives, 3 J. Health Care L. & Pol'y 151, 164-45 (1999) (discussing studies suggesting that treatment for drug addiction can help reduce recidivism rates); Eric Blumenson, Recovering from Drugs and the Drug War: An Achievable Public Health Alternative, 6 J. Gender Race & Just. 225, 234-38 (2002) (similar).

85. At least one commissioner recognized the tension between utilitarian and retributive theories in the case of drug addiction. See Nagel, supra note 15, at 914 n.190.

correlated to an increased propensity to commit crime."[86] Courts have uniformly interpreted this statement to imply that substance abuse might be a justification for departing upwards, but never downwards, from the proscribed guideline range.[87] This position is consistent with a utilitarian, but not retributive, departure rationale.

Drug abuse is not the only illustration of a conflict among sentencing purposes. In a separate paper, I explain how guideline provisions relating to family circumstances, substantial assistance, and criminal history, among others, all involve a similar conflict—a conflict that the Commission was called upon to resolve when promulgating the guidelines.[88]

The legislative history makes clear that Congress understood that every purpose could not be met in every case, and that the Commission might be forced to choose among the purposes in developing specific guideline provisions. Thus, the Senate Judiciary Committee stated:

> In setting out the four purposes of sentencing, the Commission has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of

86. U.S.S.G. § 5H1.4.

87. See United States v. Richison, 901 F.2d 778, 781 (9th Cir. 1990) ("[T]he Commission meant to foreclose consideration of dependency only as a ground for downward departure, leaving open the possibility of taking drug or alcohol abuse into account in determining where within the Guidelines a sentence should fall, or whether an upward departure is warranted, if extraordinary circumstances exist."); United States v. Pharr, 916 F.2d 129, 133 (3d Cir. 1990) ("We read policy statement 5H1.1 to mean that dependence upon drugs . . . is not a proper basis for a downward departure from the guidelines."). See also United States v. Hawk, 245 F.3d 667, 670 (8th Cir. 2001) ("the guidelines forbid reduced punishment for defendants who abuse controlled substances"); United States v. Goff, 907 F.2d 1441, 1445 (4th Cir. 1990) (reversing downward departure for drug addiction). But cf. United States v. Maier, (suggesting that, while drug dependence itself can not justify a downward departure, evidence of a defendant's post-arrest rehabilitation might).

88. See Rappaport, supra note 8.

> defendants. The Committee recognizes that a particular purpose of sentencing may play no role in a particular case.[89]

In other words, Congress recognized that the Commission would need to favor one purpose over another in some cases.[90] The SRA does not tell the Commission how to prioritize the purposes, or even suggest that all or most of the purposes should be satisfied in any given case.[91] Thus, the Act provides only limited guidance to the Commission on how to identify the aim of individual guidelines.[92] It instead focuses the attention of the

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89. Senate Report, supra note 25, at 77. See also id. at 67 ("The Committee also recognizes that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has"); id. at 76 n.166 ("It is understood, of course, that if the Commission finds that the primary purposes of sentencing in a particular case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring deterrence and incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. A balancing of competing interests is necessary."); id. at 92 ("In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations.").

90. Some theorists miss this point. Luby, for example, affirms that "Congress never asked or permitted the Commission to 'choose' among the purposes of sentencing; instead, it directed the Commission to achieve all of the purposes, and to measure the degree to which it was doing so." See Luby, supra note 31, at 1217. As I have suggested, that position violates both logic and legislative history.

91. As one of the principal drafters of the SRA later wrote, "Congress was ambivalent about the prioritization of purposes and largely fudged the issue in drafting the underlying enabling legislation." Feinberg, supra note 32, at 326.

92. One of the few restrictions on sentencing purposes imposed by the SRA concerns the traditional purpose of rehabilitation. The Act states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). Citing this provision, some commentators have suggested that the SRA rejects rehabilitation as a purpose of punishment. See, e.g., Margaret P. Spencer, Sentencing Drug Offenders: The Incarceration Addiction, 40 Vill. L. Rev. 335, 348 (1995) (stating that the Sentencing Reform Act "fundamentally altered the nation's sentencing goals and practices" by rejecting rehabilitation and embracing a "shift toward deterrence and incapacitation").

This, however, is an overstatement. The Act rejects the use of rehabilitation to justify sending an offender, who otherwise would have received a non-incarcerative sentence, to prison on the grounds that prison would be "good"

Commission on the permissible ends of punishment, delegating to the agency the difficult task of determining how purposes should be prioritized in specific situations.[93]

To sum up, the SRA places sentencing purposes at the heart of the reform movement. The legislature understood that any coherent attempt to rationalize the sentencing systems—to put them on a principled footing—requires consideration of the purposes of punishment. It understood that fulfilling the policy goals of reducing disparity and reassessing severity presupposes some view on sentencing purposes. And it understood that these efforts inevitably called upon the Commission to make some choices about which purpose would predominate in specific sentencing situations.

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for the offender. See Senate Report, supra note 25, at 67 n.140. Apart from this restriction, however, the Act otherwise permits the court and the Commission to consider rehabilitation when considering the kind or length of a sentence. See Senate Report, supra note 25, at 76-7; Nagel, supra note 15, at 901 n.109.

93. This grant of authority has been subject to some criticism, including charges that it represents an unconstitutional delegation of power. Justice Scalia's dissent in Mistretta argues that Congress may not delegate basic value choices to an agency; rather, these kinds of policy decisions should be left to the legislature. See Mistretta, 488 U.S. at 414-15 (Scalia, J., dissenting) ("It should be apparent from the above that the decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments.... It is difficult to imagine a principle more essential to democratic government than that... the basic policy decisions governing society are to be made by the Legislature."). See also Cass Sunstein, Legal Reasoning and Political Conflict 7 (1996) ("In American government and in all well-functioning constitutional democracies, the real forum of high principle is politics, not the judiciary—and the most fundamental principles are developed democratically, not in courtrooms.").

The Supreme Court disagreed that this was an impermissible delegation of "legislative authority," holding that delegations are not unlawful simply because they "carry with them the need to exercise judgment on matters of policy." Id. at 378. Indeed, as the Court observed, power over sentencing had been largely delegated in the past to the judiciary without any questions raised about its constitutionality. The SRA merely transferred decision-making power from the judiciary to an agency within judiciary. See id. at 395 ("Prior to the passage of the Act... it was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentences.... The Sentencing Commission does no more than this....").

III. THE INSTITUTION OF PRINCIPLE

Given the SRA's directive to the Commission to consider sentencing purposes, and given the central role of those purposes in fulfilling the major policy goals of the Act, one would have expected the original Commission to have made the articulation of a sentencing philosophy one of its first priorities. In fact, the original Sentencing Commission seemed to take sentencing purposes very seriously at first.

Upon their appointment, the commissioners split into two groups to draft an initial set of guidelines. One group, led by Paul Robinson, favored a just deserts approach; the other group, led by Michael Block, favored a utilitarian (or "efficiency") approach.[94] Thus, rather than embrace the idea that sentencing purposes justify identical sentencing rules, these commissioners recognized that the choice of a governing purpose made a significant difference in the guideline structure.

In the end, however, the Commission did not adopt either group's approach.[95] Indeed, it specifically rejected the idea that it should adopt a "single philosophical theory and then work deductively to establish a . . . set of categorizations and distinctions."[96] Instead, the

94. Robinson turned out to be the lone dissenter to the initial guidelines. His dissent is reprinted in Paul Robinson, Dissent From the United States Sentencing Commission's Proposed Guidelines, 77 J. Crim. L. & Criminology 1112 (1986). Robinson left the Commission in 1987, in part because of the Commission's refusal to adopt his retributive theory. Block, who also expressed significant dissatisfaction with the agency's silence on purposes, followed in 1989. For discussion of why Block and Robinson left the Commission, see Koh, supra note 70, at 1118 n.62.

95. In all likelihood, the Commission's decision to reject Block's and Robinson's approach reflected the practical constraint of an impending statutory deadline. Simply put, the commissioners were torn by dissent about philosophical principles, but they needed to produce a working guideline system in a short period of time. This offers an explanation, though not an excuse, for the continuing neglect of sentencing purposes. See infra note 193, and accompanying text.

96. Supplementary Report, supra note 14, at 17.

Commission concluded that its policy goals could be achieved without discussing sentencing philosophy at all.[97]

The following sections explore the Commission's methodology for developing the guideline rules. The first section analyzes the rhetoric used by the Commission to justify its purpose-less approach to guideline development. The second assesses the reality of the Commission's conduct, which differs in marked ways from its rhetoric. In the end, both the Commission's rhetoric and its actual conduct misconceive the agency's institutional role in developing a purpose-based sentencing system.

A. The Rhetoric of the Empirical Approach

In a report accompanying the initial set of guidelines—called the Supplementary Report on the Initial Sentencing Guidelines and Policy Statements—the Commission concluded that it would develop a Guideline system without relying directly on sentencing purposes. The Commission called its methodology the "empirical approach."[98] According to the Commission, the empirical approach solved the "philosophical problem" of choosing a sentencing philosophy, as well as the practical problem of structuring the guideline system.[99]

As the Commission explained, the empirical approach sought to create a sentencing system that mirrors, as closely as possible, past judicial practice. Using such an approach, "punishments imposed would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals."[100] Past judicial

97. See Nagel, supra 15, at 96 (the Commission concluded that it would not, and did not need to, make an explicit statement of a governing philosophy.).

98. See Supplementary Report, supra note 14, at 16-17. See Nagel, supra note 15, at 917-25 (discussing events leading up to acceptance of the empirical approach).

99. See U.S.S.G. Manual Ch. 1.A.3 (2001) (suggesting that the initial Commission's approach "solve[d] both the practical and philosophical problems of developing a coherent sentencing system. . . ").

100. Stephen G. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 17 (1988). The

practice would be examined both to determine the appropriate severity of sanctions, as well as to identify specific mitigating and aggravating factors.[101] The Commission, when it came to implementing the empirical approach, acknowledged that it made some changes to past practice.[102] But it gave the impression that these deviations were the exception and not the rule.[103]

Commission recognized that the average of past sentences did not "provide a precise picture of . . . judicial decisions." Supplementary Report, supra note 14, at 22 n.64. The ultimate sentence served by the defendant reflected not only judges' decisions but those of other actors in the system, including the Parole Commission. See id. ("the Parole Commission, the Bureau of Prisons, and the Judiciary interact to determine how long convicted offenders remain in prison. At best, the analysis reveals an amalgam of decision making processes."). Nonetheless, the Commission observed that, in this institutional mixture,

> the judiciary dominates. The judge has exclusive authority to determine whether a defendant will be sentenced to a term of imprisonment, and within the limits allowed by law, to set the maximum and minimum terms. Furthermore, because maximum good-time is fixed by law and awarded routinely, and because the Parole Commission generally follows parole guidelines, the judge can fashion sentences to conform to his intent.

Id. at 16. The Commission concluded that the empirical approach "provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, is still short enough to create a manageable set of guidelines." Id.

101. To implement this approach, the Commission initiated a study of sentencing practices under the old, indeterminate sentencing scheme. The Commission relied on two sources of information provided by the probation office. The first source contained basic information on 100,000 criminal offenders convicted during a two year period. See Breyer, supra note 100, at 7 n.50. The second source consisted of more detailed information of 10,500 offenders drawn from presentence reports. See Supplementary Report, supra note 14, at 21. Significant questions have been raised about the reliability of both data sources. For some concerns, see Nagel, supra note 15, at 929 n.248 and accompanying text. See also Miller, supra note 3, at 481 n.125.

102. Supplementary Report, supra note 14, at 17 ("The Commission did not simply copy estimates of average current sentences as revealed through analysis of the data. Rather, it used the results of analyses of current practice as a guide, departing at different points for various important reasons. The guidelines represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to current sentencing practices."); id. at 16 ("After examination [of past practice data], the Commission has accepted, modified, or rationalized the more important of these distinctions.").

103. Marc L. Miller & Ronald F. Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev. 723, 763 (1999) ("The 1987 Introduction and the 1987 Supplemental Report portrayed mirroring as the rule and other (unspecified) bases for setting the guidelines as

The subsequent section examines whether the Commission faithfully carried out the empirical approach. Here, however, the goal is simply to evaluate the Commission's own rhetoric in justifying the empirical approach. Needless to say, given the SRA's unambiguous directive that guideline sentences should be grounded on punishment purposes, the Commission would seem to be at a distinct disadvantage in defending a purpose-less approach. But the Commission offered a rationale for its methodology.

According to the agency, the empirical approach conforms with the SRA's purposes requirement because past judicial practice reflects the *judiciary*'s views of what the purposes of punishment require (limited only by the broad statutory ranges established by Congress for each crime). In other words, as the Commission itself has stated, the methodology looks "to those distinctions that judges and legislators have in fact made over the course of time."[104] In this way, the empirical approach ensured that sentences would reflect punishment purposes favored by the courts, regardless of the Commission's own views.

Despite any superficial appeal, the Commission's explanation suffers from at least three deficiencies. First, one might be skeptical that judges in the past have uniformly and reflectively imposed decisions based on the purposes of punishment. Indeed, sentencing reformers were concerned that, when making punishment decisions, pre-guideline judges relied too often on their gut instincts, which were often tainted by bias or arbitrary considerations.[105]

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the exception."). Some of the commissioners' own writings contributed to this impression. Paul Robinson, for example, has claimed that past practice was the exclusive determinant of sentences. See Nagel, supra note 15, at 931 n.255 (noting Robinson's views). Justice Breyer observed that "in creating categories and determining sentence lengths, the Commission, by and large, followed typical past practice." See, e.g., Breyer, supra note 100, at 7. But cf. id. at 7 n.49 (acknowledging in a footnote that "the Commission also made important deviations from typical past practice in the guidelines."); Nagel, supra note 15, at 927, 930-31 (affirming that past practice was used only as a starting point.).

104. Supplementary Report, supra note 14, at 17.

105. See Frankel, Criminal Sentences, supra note 17, at 69.

Second, even assuming that judges uniformly based their sentencing decisions on legitimate punishment purposes, an aggregation of these various sentencing decisions would not necessarily be consistent with a rationale favored by any decisionmaker. For example, averaging a sentence imposed for utilitarian reasons with a sentence imposed for retributive reasons might yield a sentence consistent with neither.[106] As a way of developing a principled approach to sentencing, therefore, this methodology is severely flawed.

Third and finally, the claimed reliance on the empirical approach ignores the Commission's institutional role in developing a purpose-based sentencing system. In enacting the SRA, Congress expected the Commission to exercise its independent judgment about what the purposes of punishment demand. The agency, in other words, may not rely on the judgments of other institutions—such as the judiciary—to determine what sentencing rules are justified.

This interpretation of the Commission's institutional role finds support in both the legislative history and text of the SRA. As an initial matter, a driving force of the Act's enactment was a distrust of the judiciary. Conservative reformers argued that the courts, guided by an overly

106. An illustration makes this point clear. Consider two severely disturbed offenders who have committed a serious offense and who are sentenced before two different judges. The first judge treats the emotional disturbance as a mitigating factor under a retributive rationale and therefore decides that a short sentence is appropriate. The second judge views the emotional disturbance as an aggravating factor under a utilitarian rationale (because the defendant appears to be a higher risk of recidivism), and therefore decides a longer sentence is appropriate. Averaging these positions will result in a sanction that serves neither purpose of punishment. For similar criticism of the averaging approach, see Miller, supra note 3, at 442 ("Average sentences may distort rather than reflect the purposes being pursued."); Koh, supra note 70, at 1118 (1992).

To be sure, the ultimate result might appear consistent with a hybrid theory that balances utilitarian and retributive considerations. But even hybrid theorists must embrace a specific methodology for balancing utilitarian and retributive factors to generate a just sentencing result. It would be surprising if the aggregation of the varied judicial sentencing decisions happened to coincide with the preferred hybrid approach. Moreover, as I argue in a separate paper, serious questions exist about the coherence of hybrid theories generally. See Rappaport, supra note 8, at Part VI.

optimistic ideology of rehabilitation, tended to be too lenient on offenders.[107] Liberals believed that judges were often arbitrary or biased in their sentencing decisions. The Commission's empirical approach, taken on its face, is inconsistent with this shared, and fundamental, skepticism of judicial conduct.

The plain text of the SRA makes absolutely clear that Congress did not intend the agency to give past practice overriding significance. As 28 U.S.C. § 994(m) states,

> [t]he Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial set of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission .... The Commission shall not be bound by such average sentences, and shall *independently* develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code.[108]

Congress used strong mandatory language (i.e., "shall not be. bound") in referring to past judicial practice. The legislative history confirms that Congress did not view past practice as definitive.[109] Several of the original commissioners acknowledged that they were not bound by

107. See Nagel, supra note 15, at 928 ("The Sentencing Reform Act was passed, at least in part, to make patently clear the rejection of the rehabilitative model and goals upon which past sentencing decisions had been made ....").

108. 28 U.S.C. § 994(m) (emphasis added).

109. See, e.g., Senate Report, supra note 25, at 177 ("The bill makes clear that the Commission need not follow the current average sentences if it finds that they do not adequately reflect the purposes of sentencing.... It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices of the past."); id. at 61 ("[T]hese provisions are not designed to require the Sentencing Commission to recommend a continuation of current sentencing practices; they are included to assure that the Commission studies current practice sufficiently to avoid *inadvertent* changes in that practice.") (emphasis in original).

past judicial practice, and that the past practice averages contained irrationalities.[110]

Given Congress's distrust of judicial practice, one might wonder why the SRA permits consideration of past practice at all. The most appealing explanation is that the provision reflects a pragmatic compromise.

Congress probably understood that several obstacles prevented the Commission from developing a principled sentencing structure immediately. As an initial matter, the task of developing a new sentencing system was a daunting one, and Congress wanted the job finished in a relatively short period of time.[111] Moreover, given the persistent debates among criminal theorists, Congress may have understood that it would be difficult for a multi-member agency to reach agreement about punishment purposes immediately.[112]

Facing those difficulties, Congress authorized the Commission to use past practice as a starting point–as a way to avoid the difficult philosophical and practical problems in developing an initial guideline system. At the same time, Congress made clear that it did not want that to be the final state of affairs. It envisioned the Commission

110. See Breyer, supra note 100, at 18 (starting with average sentences "will reflect irrationality in past practice," if "only to a degree."); Nagel, supra note 15, at 929. Commentators have made similar criticism. See, e.g., Alschuler, supra note 7, at 907 n.19 (and accompanying text).

111. The Sentencing Reform Act initially established an 18 month deadline for the Commission to promulgate the first set of guidelines. Pub. L. No. 98-473, § 235(a)(1)(B)(i), 98 Stat. 1837, 2031 (1984). The deadline was ultimately extended an additional year. See Janet Alberghini, Structuring Determinate Sentencing Guidelines: Difficult Choices For The New Federal Sentencing Commission, 35 Cath. U.L. Rev. 181, 188 n.53 (1985).

112. As then Commissioner Breyer noted, the original Commission's decision to adopt an empirical approach was a "a compromise forced upon the Commission by the institutional nature of the group guidelines writing process," operating under a strict statutory deadline. Breyer, supra note 100, at 15. See also Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 747, 760 (1987) (Statement of Paul Robinson), quoted in Koh, supra note 70, at 1118 ("[T]he pivotal decision to follow mathematical averages of past sentences was never the subject of Commission debate or discussion" but was the "result of last minute private arrangements."). In this sense, the empirical approach was, among other things, an expedient to avoid the philosophical debates that divided the commissioners.

progressively changing the guidelines to bring them into line with sentencing purposes.[113] In that way, the guidelines would evolve toward greater "rationality" over time.

For this reason, the Commission's embrace of the empirical approach as the touchstone of its sentencing decisions–rather than as a starting point for a more rigorous analysis of punishment purposes–remains problematic. Pursued faithfully, this approach contravenes clear statutory commands and conflicts with the Commission's institutional obligation to make an independent assessment of sentencing levels. The question remains, however, whether the Commission truly embraced judicial practice as its rhetoric suggests. The answer, as the following section contends, is that the reality of the empirical approach is far more complex than the agency's rhetoric suggests.

B. The Empirical Approach Reconsidered

In an important sense, criticizing the Commission for following past practice is unfair. True, the Commission's rhetoric suggests that the agency followed past practice closely. But in actuality it departed frequently from past results, often in quite significant ways.[114] Kate Stith and

113. Congress clearly expected the guidelines to be an evolutionary system. See, e.g., Senate Report, supra note 25, at 77 ("[T]he Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing .... To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.").

This is the way several commissioners saw the issue, as well. Thus, Commissioner Breyer, after acknowledging that past practices might contain "irrationalities," observed that, "the Commission's system is evolutionary. The Commission can continually revise its Guidelines in the direction of an even more rational sentencing system ...." Breyer, supra note 100, at 18. See also Nagel, supra note 15, at 932 & 942.

114. See, e.g., Mistretta, 488 U.S. at 413 (Scalia, J., dissenting) (the Commission "could and regularly did deviate from those averages as it thought appropriate"); Miller & Wright, supra note 103, at 752 ("The outcomes under the guidelines bear little resemblance to past practice."). See also id. at 760 ("[I]f the

Jose Cabranes have noted that the changes implemented by the Commission altered sentences in almost every offense category.[115] Moreover, the Commission's deviations from past practice have continued since the promulgation of the initial guidelines. Most of these changes made the new sentences significantly harsher than before. As a result, today many crimes receive sentences that are two to three times as severe as pre-guideline punishments.[116]

In making these sorts of changes, the Commission exercised significant discretion. Many of the changes were initiated by the Commission without binding statutory directive. Thus, the Commission initiated changes to, among other things, guidelines for firearm, national defense, robbery, white collar, and violent offenses.[117] Other changes were mandated by law. Congress made explicit changes to the sentencing laws for crimes such as drug offenses, money laundering, and criminal sexual conduct.[118] But even here the Commission often had significant discretion over how to implement the changes. Thus, the Commission exercised its discretion to make drug sentences higher in many cases than the mandatory minimums required.[119] All told, the reality of

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guidelines mirrored past sentencing practices in the federal system, they did so in a fun-house mirror whose angles, curves and twists were unexplained.").

115. See Kate Stith and Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 46-47 (1998); Miller, supra note 3, at 466 n.243 & n.245 (discussing modifications to past practice).

116. See Aaron Rappaport, The State of Severity, 12 Fed. Sent. Rep. 3 (1999) (summarizing changes in severity levels). See also Berman, supra note 3, at 93 (noting tendency of Commission to "fight crime with more time").

117. See Supplementary Report, supra note 14, at 18.

118. See Supplementary Report, supra note 14, at 18. The methods used by Congress have varied. They include the creation of statutory mandatory sentences, which trump any conflicting guideline provisions, as well as detailed directions to the Commission to enact specific guideline sentences. Congress can also interfere in less formal ways, such as by pressuring the Commission through Congressional staff contacts. See Parker & Block, supra note 36, at 1023-25 (discussing various methods of Congressional control). See also Berman, supra note 3, at 109.

119. This decision has been heavily criticized by Commission observers. See, e.g., Barbara Meierhoefer Vincent, The Severity of Drug Sentences: A Result of Purpose or Chance?, 12 Fed. Sent. Rep. 34 (1999).

the Commission's actions was very different from its rhetoric.[120]

Given the numerous departures from past practice, one might conclude that the Commission followed the statutory methodology. It began by calculating past practice averages; it then modified those averages as it saw fit.[121] But closer analysis reveals serious flaws in the Commission's approach—for reasons not often appreciated by observers. The problem is not that the Commission departed from past practice—the statute expects the agency to do that. Rather, the problem is that the Commission departed from past practice *for the wrong reasons*.

Identifying those reasons is not straightforward because the agency itself offered only the most limited explanations for its initial deviations.[122] Nonetheless, the available evidence suggests that the Commission did not rely on an assessment of purposes when modifying past practice. Instead, the agency seemed to respond to political and public pressure, especially to growing concerns about rising crime rates.

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120. Given this reality, why did the Commission emphasize past practice? One might speculate that its rhetoric made guideline development seem less radical to certain key interests groups, including the federal judiciary. At a time when the Commission was dramatically limiting the courts' authority over sentencing, the rhetoric of judicial past practice made these changes seem more palatable. See Miller & Wright, supra note 103, at 756 (Reliance on past practice "sent a reassuring message to judges: the guidelines would not change sentences radically. They would simply enforce closer adherence to norms that the judges themselves had established.").

121. The Commission itself claimed that it was following the mandate of 28 U.S.C. § 994(m). See Supplementary Report, supra note 14, at 16 (claiming that its approach, "while criticized by some as insufficiently radical, clearly appears to be the one that the legislation contemplated").

122. See Miller & Wright, supra note 103, at 758 (suggesting that no way exists to tell why changes occurred or how great the changes really were because "there is no complete accounting of the areas where the Commission left past practice behind"). To take one notable example, the Commission significantly raised the penalties for white collar crimes. In doing so, however, it merely explained that "the Commission was convinced that they were inadequate." Supplementary Report, supra note 14, at 19.

In its Supplementary Report, the Commission stated that, in enacting the initial guidelines, it sought to respond to the desires of many interest groups.[123] Several commissioners more or less acknowledged that public and Congressional opinion played a significant role in the agency's rulings.[124] Reviewing the evidence, Peter Rossi and Richard Berk conclude:

> [T]he U.S. Sentencing Commission tried to write sentencing rules that would be acceptable to the federal judiciary, the federal prosecutors, the criminal defense bar, and other stakeholders concerned. The end result was a set of guidelines that were also close to the views of the general public. The commission may not have had convergence as its explicit goal, but the ways in which the commission went about writing the guidelines assured that the guidelines converge on those views.[125]

In short, lacking a clear set of principles, the Commission pursued political objectives rather than undertaking a principled effort to promote the purposes of punishment.[126]

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123. Supplementary Report, supra note 14, at 17 (the guidelines represented "an amalgam of views, and provide for sentences that are reasonably consistent with most of those views.").

124. See Breyer, supra note 100, at 8 (acknowledging that the Commission is, to a degree, a "political body"); Nagel, supra note 15, at 932 (discussing relevance of public opinion).

125. See Peter H. Rossi & Richard Berk, Just Punishments: Federal Guidelines and Public Views Compared 210 (1997). See also Michael Tonry, Sentencing Matters 63 (1996) ("Most proponents of guidelines have seen its one-step-removed-from-politics character as a great strength . . . . The U.S. commission, by contrast, made no effort to insulate its policies from law-and-order politics and short-term emotions.").

126. The Commission appeared to adopt the same approach in the years following the enactment of the original guidelines. Like the original guideline decisions, subsequent amendments rarely contained a detailed statement of purpose. See Leonard Orland, The Commission's Supplemental Report on Corporate Punishment: Where Is the Statement of Reasons?, 4 Fed. Sent. Rep. 158, 158 (1991) ("Since November 1, 1987, the Commission has submitted extensive guideline amendments to Congress five times. On each occasion, the Commission failed to explain what it had produced"). And, like the original guideline decisions, the amendments often appeared political in spirit. See Samuel Buffone, Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?, 4 Fed. Sent. Rep. 137, 139 (1991) (the amendment process

Again, the Commission has at least hinted at a justification for this course of action. In the Supplementary Report, it suggested that its sentencing rules would be consistent with the purposes of punishment, if only because the distinctions incorporated into the guidelines were the "ones that the community believes, or has found over time, to be important from either a moral or a crime control perspective."[127] The community's values, in short, would serve as a guide to promoting the purposes of punishment.

The flaws in deferring to community values (or public opinion) are nearly identical to the flaws in following past judicial practice. First, no assurances exist that community values reflect sentencing purposes; the community's views on an appropriate punishment may be tainted by bias or misinformation.

Second, even if we assume, perhaps fancifully, that individual participants in the political process—politicians, the public, and others—take positions on sentencing based on principled assessment of punishment purposes, no guarantee exists that the *aggregation* of these preferences will be principled. This is true for the same reasons that the average of judicial sentences is not likely to be consistent with any single principle of punishment.[128]

Third, even if the opinions of politicians, the public, or the judiciary were consistent with one or more purposes of punishment, relying on those opinions would still violate the Commission's institutional role under the SRA. As we have observed, the SRA states that the Commission should make an *independent* judgment about which deviations from past practice are justified on the grounds of

"often can appear as arbitrary and capricious rule-making relying on the instincts or political judgment of the individual commissioners rather than a sound empirical basis or application of an expert body of knowledge."); Parker & Block, supra note 36, at 1019 ("the 1989 amendments to the robbery and fraud guidelines both . . . involved gratuitous increases in punishment levels that had no basis in either principle or practice, and instead were essentially political decisions reflecting responses to interest group pressures.").

127. Supplementary Report, supra note 14, at 17.

128. See supra note 106, and accompanying text.

punishment purposes.[129] And that meant, in part, independence from public opinion.[130]

Leading up to the SRA's enactment, advocates for reform repeatedly emphasized that a rational debate over sentencing was difficult in the political arena given the passions stirred up by criminal conduct.[131] Reflecting these concerns, Congress looked to the Commission to chart its own course in sentencing policy.[132]

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129. See 18 U.S.C. § 994(m) (the "Commission shall . . . independently develop a sentencing range that is consistent with the purposes of punishment."). By contrast, the SRA remains agnostic regarding the relevance of public opinion to the sentencing decision. The SRA does not require the Commission to obey public opinion; rather, it says that the Commission should "consider" whether "community view of the gravity of the offense" or "public concern generated by the offense" shall "have any relevance to . . . the appropriate sentence." Moreover, it directs the agency to "take [public views] into account only to the extent that they do have relevance." 28 U.S.C. § 994(c). See also 28 U.S.C. § 994(s) (Commission shall "give due consideration" to petitions referring to "the community view of the gravity of the offense" and "the public concern generated by the offense"). In a forthcoming article, I briefly discuss the relevance of public opinion to guideline development, suggesting that it should play a limited, secondary role in the sentencing process. See Rappaport, supra note 8, at Part VII.

130. See Senate Report, supra note 25, at 175 (speaking of importance of "intelligent and dispassionate professional analysis" in the Commission's determination of the relevance of offender characteristics); id. at 179 (noting that the Commission is expected to offer recommendations for changing statutory ranges based on independent judgment). Cf. id. at 160 ("For such a critical appointment, Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority.").

131. See Berman, supra note 3, at 95. See also Miller, supra note 3, at 439 n.114 ("Judge Frankel suggested the creation of a sentencing commission precisely because of the impossibility of resolving highly political or at least rhetorical problems of setting sentences for offenders.").

132. Buffone, supra note 126, at 137 ("The movement for sentencing reform which culminated in the Sentencing Reform Act of 1984, had as one of its principal objectives depoliticizing the sentencing process. The decision to establish an expert body to carry out broadly formulated congressional directives envisioned an administrative body cast in the form of prior administrative agencies free from the political motives of Congress and with sufficient time and opportunity to craft a sentencing policy."). Commentators continue to view the Commission's ostensible independence from the political process as a potential—if often unrealized—advantage of the agency. See Charles D. Weisselberg, Courage, Courage, 8 Fed. Sent. Rep. 51 (1995) (urging the Commission "to lead, even when your actions may displease some in Congress, the Administration, or the Judiciary").

The structure of the Commission reflects this institutional role. Congress designed the Commission as an independent agency—not one immediately responsive to public opinion.[133] And the agency is structured like one—with commissioners serving staggered terms and composed of representatives from both parties.[134] The Commission's amendments do not need express Congressional approval. To the contrary, those amendments automatically become law, unless Congress enacts legislation to override them.[135] These considerations led one perceptive observer to conclude: "In passing the SRA, Congress apparently accepted the force of those arguments regarding its own likely failure."[136]

We can see now that both the rhetoric and reality of the Commission's initial sentencing methodology were inconsistent with Congressional dictates. The Commission's rhetoric embraced past practice as the principal guide for determining just punishment levels. That approach ignored Congress' skepticism about judicial sentencing. The Commission's actual conduct reflected a heightened sensitivity to political pressures for higher sentences. That approach conflicted with Congress's desire to create an institution somewhat insulated from public opinion.[137]

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133. 28 U.S.C. § 991(a) (describing the Sentencing Commission as an "independent commission in the judicial branch."). See also U.S.S.G. Ch.1, Pt.A, intro. cmt., at 1.

134. 28 U.S.C. § 991(a) ("Not more than four of the members of the Commission shall be members of the same political party."); 18 U.S.C. § 992 (requiring staggered terms).

135. 28 U.S.C. § 994(p).

136. See Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1, 8-10 (1991). The Commission's independence from Congress and public opinion might even be considered a constitutional requirement. The Supreme Court, in Mistretta, upheld the constitutionality of the Commission, in part based on its non-political character. See Parker & Block, supra note 36, at 1020.

137. To say that unthinking reliance on public opinion conflicts with Congressional intent is not to suggest that a legal challenge to the agency's methodology would likely succeed. Courts have been extremely hesitant to strike down Commission rulemakings on the grounds that they are inconsistent with the SRA. See Luby, supra note 31, at 1234 ("Too often, courts acknowledge the

In the end, both the rhetoric and the reality of the Commission's conduct share a common flaw. Both are avoidance techniques—ways of suppressing the need to address sentencing purposes. Both techniques allow the Commission to hide behind the views of other entities, whether they are the views of the judiciary or the public itself. Both, in other words, violate Congress' core demand that the Commission make an independent assessment of what the purposes of punishment demand.

IV. THE NEED FOR A *PUBLIC* STATEMENT OF PURPOSES

The previous sections suggest that the Commission violated Congressional intent by failing to make an independent assessment of what the purposes of punishment demand, principally by deferring to the judgment of other institutions concerning appropriate sentencing levels. In this Part, I suggest that, even assuming *arguendo* that the Commission secretively based its guideline decisions on sentencing purposes, its rulemaking would be flawed for an additional reason. Namely, the agency failed to publicize those underlying rationales. The Commission failed, in other words, to promulgate a *public* statement of purposes.

A public articulation requirement might be thought implicit in the agency's obligation to consider purposes. After all, without a public statement of purposes, Congress can not assess whether the Commission has satisfied its statutory obligation.[138] Moreover, the view that the

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tension between a challenged guideline provision and the statutory provision it allegedly violates, only to uphold the guideline provision on the basis of some other statutory command. This, in effect, permits the Commission to choose which statutes it will obey."). Nonetheless, for the purpose of this paper, I am taking Congress's goals for the Commission as an appropriate standard for assessing the Commission's record over the past 15 years. If one finds this standard unappealing, different conclusions about the Commission's performance will plainly result. See infra note 4.

138. This position is consistent with legislative history suggesting that congressional review, rather than judicial review, was expected to be the principal means for ensuring that the Commission fulfills its statutory obligations. See United States v. Lopez, 938 F.2d 1293 (D.C. Cir. 1991) (discussing legislative

Commission has a duty to articulate its sentencing philosophy finds support in the legislative history. For example, the Senate Judiciary Committee's Report affirmed that, with the passage of the SRA, "[f]ederal law will assure that the Federal criminal justice system will adhere to a consistent sentencing policy. Further, each participant in the system will know what purpose is to be achieved by the sentence in each particular case."[139]

Several provisions of the SRA lend further support to the idea that Congress expected the Commission to articulate the purposes underlying its guideline decisions. For example, section 994(x) directs the Commission to obey APA requirements that agencies provide a "concise general statement" of a rule's "basis and purpose."[140] And section 994(p) says that any amendment to the guidelines "shall be accompanied by a statement of reasons. . . ."[141] Both provisions arguably require the Commission to publicly articulate the specific purpose (or purposes) served by individual guideline decisions.[142] These various statutory

history suggesting that Congress and public have role in reviewing commission guidelines). See also Senate Report, supra note 25, at 181 (noting that there is ample provision for review of the guidelines by Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.").

139. See Senate Report, supra note 25, at 59.

140. 28 U.S.C. § 994(x) applies 5 U.S.C. § 553 of the Administrative Procedures Act to the Commission's rulemakings. Section 553(c) obligates the Commission to promulgate a "general statement" of the rule's "basis and purpose." As the legislative history makes clear, this procedural requirement is "an exception to the general inapplicability of the APA—including its requirement of publication in the Federal Register—to the judicial branch." Senate Report, supra note 25, at 180. See also Luby, supra note 31, at 1221 ("Congress apparently exempted the Commission from the Administrative Procedure Act's other requirements.") (citing cases); Samuel J. Buffone, The Federal Sentencing Commission's Proposed Rules of Practice and Procedure, 9 Fed. Sent. Rep. 67, 68 (1996).

141. 28 U.S.C. § 994(p).

142. When drafting the initial guidelines, the original commissioners adopted "drafting principles" that included a commitment to articulate reasons for any departure from past practice. See Breyer, supra note 100, at 50 (drafting rule number six states that "[p]resent practice will not be treated as dispositive, but when the departures are substantial, the reasons for departure will be specified."). See also id. at 17-18 (affirming that "where the Commission did not follow past practice, it would consciously articulate its reasons for not doing so"); Nagel, supra note 15, at 923 (noting that initial Commission agreed that "for articulated policy reasons, sentences could be raised or lowered with respect to past practice").

provisions may not be enforceable in a court of law.[143] But they at least provide evidence that Congress expected the Commission to articulate the underlying rationales for its sentencing rules.

The argument in support of a public articulation requirement is not simply one of Congressional intent, however. Such a requirement is also justified on policy grounds. Specifically, as the following sections suggest, a

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143. One reason these provisions might not be readily enforceable in a court of law is that the provisions have been interpreted to impose only the most limited burdens on administrative agencies. For example, courts have said that 5 U.S.C. § 553(c) requires an agency to consider and evaluate important issues only in a very general way. Thus, courts have upheld rulemakings where no statement of purposes at all has been appended to the rules, but where the "basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed." Hoving Corp. v. Federal Trade Commission, 290 F.2d 803, 807 (2d Cir. 1961).

Section 994(p) of the SRA appears equally toothless. Under this provision, even the most minimal sort of explanation has been deemed sufficient to survive review. Thus, in one of the few cases citing this provision, a court concluded that the Commission had fulfilled its obligation when the agency declared that an amendment to the firearm guidelines was needed to ensure that the rules "more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses." United States v. Cooper, 35 F.3d 1248, 1254 (8th Cir. 1994) (quoting U.S.S.G, App. C, Amend. 374 (1991)), vacated on other grounds, Cooper v. United States, 514 U.S. 1094 (1995).

Finally, the SRA specifically exempts the Commission's rulemakings from the APA provisions relating to judicial review. See Senate Report, supra note 25, at 181 ("It is . . . not intended that the guidelines be subject to appellate review."); Miller & Wright, supra note 103, at 802-03 (discussing exemption). Appellate courts have ruled, or strongly suggested, that they lack jurisdiction to review the adequacy of the Commission's explanation for its guidelines decisions. United States v. Wimbush, 103 F.3d 968, 970 (11th Cir. 1997); United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991). See also Cooper, 35 F.3d at 1254.

Several commentators have argued that courts still have at least one tool—their departure authority—to force the Commission to articulate explanations for the guidelines. That is, courts can hold that a departure is permissible (because the Commission did not "adequately consider" the applicable rule) whenever the agency fails to articulate a detailed statement of the rule's basis and purpose. See, e.g., Feinberg, supra note 32, at 327 ("A strong argument can be made that, by ignoring the Congressional mandate to consider purposes, the Commission has failed to consider variables very relevant to the individually tailored sentence."); Luby, supra note 31, at 1257 ("Congress arguably placed upon the Commission the onus of establishing 'adequacy of consideration'"). However, no appellate decision of which I am aware has upheld a departure on the basis of an inadequate Commission explanation.

public statement of sentencing purposes is essential if the Commission is to fulfill its principal policy goals—of reducing disparity and reassessing sentencing severity.

A. Sentencing Disparity Revisited

Increased disparity is probably the most obvious problem that occurs when the Commission fails to articulate a rationale for its sentencing decisions. The fragmented institutional structure set up by the SRA is the principal cause of this shortcoming. Under the SRA, the Commission announces general sentencing rules, but courts are called upon to apply those rules in specific cases.

If the guidelines were simply bright line rules requiring little interpretation, the fragmented structure would pose little concern: Courts would apply the rules as the Commission intended. But many guideline provisions constitute vague standards; judges necessarily exercise significant discretion in applying these provisions. In doing so, the court's interpretation of the rule will often turn on the judge's view of the guideline's underlying rationale.

Consider a relatively straightforward example—a departure from the guidelines for "mental illness." The relevant guideline states: "mental . . . conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range . . . ."[144] Again, that standard implies that departures may be appropriate in exceptional cases.

Suppose, then, that the offender has committed a violent offense, but under the grip of an exceptionally severe mental illness (though not severe enough to make the offender eligible for the insanity defense). Suppose also that the judge decides to depart based on the defendant's mental condition. In this case, should mental illness serve as a mitigating or aggravating factor?

The Commission's rules do not say, and so the judge's sentence will turn on the sentencing purpose he or she

144. See U.S.S.G. § 5H1.3.

favors.[145] A utilitarian might treat mental illness as an aggravator because it signifies a heightened risk of recidivism. A retributionist might treat the factor as a mitigator because it signifies a lesser degree of culpability for the crime. To the extent courts embrace different sentencing philosophies, similarly situated offenders will receive dramatically different punishments.[146]

Another, more complex, illustration concerns the defendant's criminal record. Using a complicated formula, the guidelines assign a "criminal history score" to each offender. Based on that score, the defendant is grouped into one of six criminal history categories. The highest category—category VI—encompasses all offenders who have 13 or more "criminal history points."[147]

Suppose a defendant comes before the court with an extensive criminal record totaling 26 criminal history points. The prosecution asks the judge to depart upwards from the guideline range because of the extensive criminal record. Under the guidelines, a departure is appropriate "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the

145. The Commission offers more guidance when a *non-violent* offense has occurred. Section 5K2.13 states that, "[i]f the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentences may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public." U.S.S.G. § 5K2.13.

146. It is interesting to note that the mental conditions guideline technically satisfies the SRA's requirement that the Commission ensure its sentencing rules are based on the purposes of punishment. At least formally, the guideline is consistent with *both* purposes. And depending on the purpose identified by the judge, the guideline would justify either an upward or downward departure. Given this ambiguity in application, we might call this guideline a "fuzzy rule." Of course, the defendant's sentence does not remain fuzzy forever. Once the judge departs from the guideline rule and chooses a sentence, he or she must adhere to a specific purpose of punishment. Thus, a fuzzy rule, such as this one, represents a delegation of power from the Commission to the judiciary to determine the guidelines purpose.

147. U.S.S.G. Ch. 4.

defendant will commit other crimes . . . ."[148] Is this such a case? Again, the answer depends on the judge's view of the purpose of the criminal history guidelines.

A common retributive intuition is that a criminal record somehow makes a defendant more culpable: The longer a criminal record, the more culpable the defendant. Thus, for a retributionist of this sort, a defendant with 26 criminal history points would be far more culpable than one with only 13 points, even though both would be treated the same under the guidelines (i.e. both would fall within criminal history category VI).[149] As a result, a retributionist judge might feel justified in departing upwards from criminal history category VI where a defendant has significantly more than 13 criminal history points.[150]

A utilitarian, however, might have a very different view of the matter. A common utilitarian conception is that an offender's criminal record is relevant for assessing the defendant's recidivism risk. Studies (and common sense) indicate that the longer a defendant's criminal record, the greater the defendant's risk of recidivism.[151] At the same time, one would expect that each additional prior offense would have a diminishing significance for assessing recidivism risk. That is to say, the fact that a defendant has one prior conviction might be highly relevant to assessing his chance of reoffending, but whether he has 3

148. U.S.S.G. § 4A1.3.

149. See, e.g., Spencer Freedman, In Defense of Criminal History Departures, 13 Fed. Sent. Rep. 311, 315 (2001) ("[A] system that rates an offender with thirteen criminal history points . . . at the same level as an offender with twice as many points or more does not accurately account for the severity of each offender's criminal past."); Gerald E. Rosen, Why the Criminal History Category Promotes Disparity—and Some Modest Proposals To Address the Problem, 9 Fed. Sent. Rep. 205, 206 (1997) (similar).

150. The same concerns motivated one federal judge to argue that the Commission should at the very least create additional criminal history categories to account for the increased culpability of defendants with egregious criminal history records. See Rosen, supra note 149, at 207. Spencer Freedman has made a similar suggestion. See Freedman, supra note 149, at 315. See generally Aaron J. Rappaport, Criminal History and the Purposes of Punishment, 9 Fed. Sent. Rep. 184 (1997) (discussing proposal to expand number of criminal history categories).

151. See supra note 69.

or 4 prior convictions would be less significant, and whether he has 10 or 11 would be even less relevant.

At some point, additional convictions should have a negligible effect on assessing recidivism risk. This is just the common sense idea that prior convictions have diminishing marginal utility in identifying high risk offenders. With that assumption, a utilitarian might plausibly conclude that the difference between a defendant with 13 criminal history points and one with 26 points is not significant—or at least not significant enough to warrant a departure from the criminal history guidelines.

Both the mental illness and criminal history examples suggest that, absent a Commission statement of purposes, individual judges will make their own assessment of the guidelines' rationale.[152] The inevitable result is disparity, since judges hold a range of views about the purposes of punishment.[153] That means that the very same mental condition or criminal history record might be used to justify an upward departure in one case and no departure (or even a *downward* departure) in another. A clear statement of purposes from the Commission might not eliminate all sources of disparity in the federal system, but it could remove at least one significant reason why similarly situated offenders sometimes receive disparate sentences.[154]

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152. Freed, supra note 32, at 1709 (noting that the Commission's silence on purposes leaves it to the individual judge to "identify a purpose . . . in each case, according to the judge's own standard. . . ."); Miller, supra note 3, at 441 ("[W]ithout identified purposes courts will be left without an essential tool for determining whether a sentence produced by the rules is appropriate or what kind and degree of departure is appropriate. Moreover, courts will be left without adequate principles for interpreting ambiguity in the rules.").

153. See Miller, supra note 3, at 452 (Congress understood that disparity reflected, in part, the fact that "judges pursued different purposes in sentencing similar offenders, thus rendering different sentences."); Koh, supra note 70, at 1124 ("The point is not that judges are unable to individualize sentences by departing . . . , but rather that in exercising this discretion, judges use different sentencing philosophies and thus arrive at disparate sentences.").

154. To be effective in reducing departures, the Commission's statement of purposes must be binding on the courts. For that to occur with respect to departures, the statement of purposes must be incorporated into the guideline manual. The SRA only requires a judge, when contemplating a departure, to consider agency directives included in the guideline manual and policy

B. Sentencing Severity Revisited

The effect of a statement of purposes on sentencing disparity is relatively straightforward. In this section I advance a more controversial claim—that a statement of purposes can also help the Commission fulfill its institutional responsibility to make an independent judgment about the appropriate severity of sentences. A statement of purposes will help in two ways. First, it will encourage the commissioners themselves to act in a more principled manner; second, it will help the Commission resist external political pressures when making guideline decisions.

1. Disciplining the Commission

A central benefit of a public statement of purposes concerns its effect on the Commission's internal deliberations. Previous sections have noted that the Commission sometimes acts for political reasons—responding to, among other things, Congressional pressure and public opinion. Why this is so is undoubtedly complex. One factor may be that the commissioners are often political appointees themselves. They frequently have ties to the Chairperson and Ranking Minority member of the Senate Judiciary Committee, who sponsor them for Commission membership. They may have an interest in further advancement in the federal government. For these and other reasons, commissioners may seek to avoid unpopular stands on sentencing policy.

A public statement of principles offers a way for the Commission to discipline itself, principally by establishing a clear public standard for assessing guideline decisions. In essence, the Commission binds itself to a specific set of

statements. See 18 U.S.C. § 3553(b) ("In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission.").

penological objectives.[155] A public statement of philosophy encourages the Commission to test its policies explicitly against underlying purposes. Doing so can help root out arbitrary, inconsistent, and unjustifiable sentencing rules.[156]

For example, commentators have argued that the Commission's robbery guidelines are problematic as presently structured.[157] Under those guidelines, an offender's sentence is based, in part, on the "the dollar loss" caused by the robbery.[158] However, the sentence is not affected by the defendant's specific *mens rea* with respect to that loss. Thus, an offender convicted of robbing a store of $5,000 will be sentenced the same whether he intended to take that amount or, instead, intended to take a far lesser amount.[159] That seems troublesome from a just deserts perspective, since the offender's culpability is widely thought to vary depending on the defendant's mental state.[160]

Although more debatable, the structure of the robbery guidelines may also be troublesome from a utilitarian perspective, since a defendant who commits a crime intending to cause a certain harm seems more dangerous (and perhaps more deterrable) than one who only negligently causes that harm.[161] Here is an area where a statement of purposes might trigger a reassessment of the guideline structure. By establishing a specific rationale for

155. It may also offer individual commissioners, seeking to do the right thing, an excuse for rejecting political overtures (i.e., "the Commission's principles made me do it").

156. See Sunstein, supra note 93, at 38 ("When people theorize, by raising the level of abstraction, they do so to reveal bias, confusion, or inconsistency.").

157. See, e.g., John Kramer, Offense Severity: Complex Choices, 12 Fed. Sent. Rep. 37, 38-39 (1999) (criticizing the structure of the robbery guidelines).

158. U.S.S.G. § 2B3.1(b)(7).

159. See, e.g., U.S. v. Richardson, 238 F.3d 837, 840 (2001) ("The guidelines contain numerous provisions enhancing punishment when the defendant causes more than the usual harm that the offense inflicts, without regard to whether unusual harm was intended. An example is U.S.S.G. § 2B3.1 . . . .").

160. See infra Part II.A.2 (discussing "just desert" theory).

161. For a more detailed analysis of the complex relationship between utilitarianism and the structure of the guidelines for economic crimes generally, see Rappaport, supra note 8, at Part V.

the robbery guidelines, the Commission might be encouraged to reevaluate whether the guideline structure is well-suited for serving its penological purposes.[162]

In the same vein, a public statement of principle would provide a focus for the Commission's future research efforts. The SRA clearly directs the Commission to pursue empirical research and to incorporate that research into the sentencing system.[163] But the Commission has largely failed in this mission; it has, until very recently, initiated few research projects. Articulating the rationale of a guideline rule will encourage questions about whether the rule is well-structured to serve its objective. That, in turn, can generate pressure for research efforts to test that proposition.[164]

Suppose, for example, that the Commission identified incapacitation as the central purpose of the criminal history guidelines.[165] The inevitable question would remain: How effective are these guidelines in meeting crime-fighting goals? To offer an answer, the Commission would need to examine, among other things, empirical research concerning the link between criminal history and recidivism rates.[166]

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162. That is precisely the point of the Commission's former staff director, who criticized the Commission for failing to specify "what factors such as dollar loss are measuring." According to Kramer, if the Commission "had addressed the issue," and articulated, say, a just deserts rationale, "it probably also would have had to admit that some part of the loss may in some cases be fortuitous rather than reflective of culpability." Kramer, supra note 157, at 38-39.

163. See, e.g., 28 U.S.C. § 991(b) ("The purposes of the United States Sentencing Commission are to . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and . . . develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . . .").

164. Different punishment purposes call for different kinds of research efforts. For example, a utilitarian approach would assess empirical studies on deterrence effects and recidivism rates to determine optimal punishment levels. A just deserts approach, by contrast, would deem these materials irrelevant.

165. I argue in a separate paper that only the utilitarian objective of incapacitation can plausibly explain the actual structure of the Commission's criminal history guidelines. See Rappaport, supra note 8, at Part IV.

166. When the criminal history rules were first promulgated in 1987, the Commission affirmed that it would undertake empirical studies to assess the

To sum up, a public statement of purposes may encourage the Commission to consider in a deliberate and reflective manner whether its guidelines are doing a good job in promoting their underlying objectives. The result of such an effort, one might hope, would be a more just and justifiable sentencing system.[167] As Marc Miller has suggested, this is perhaps "the strongest argument in favor of efforts to integrate purposes into actual systems and sentences . . . . [T]he real hope that sentences might become wiser, more moderate, and more humane."[168]

2. Principles and Politics

Although a public statement of purposes may help to discipline the Commission's activities, this alone may not be sufficient to ensure independent action by the agency. Even an agency that is committed to acting in a principled manner will face external political constraints. Perhaps the most significant constraint is imposed by Congress itself, which has the legal authority to block or undermine

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predictive power of the criminal history score. Linda Drazga Maxfield, Legal Issues and Sociolegal Consequences of the Federal Sentencing Guidelines: Prior Dangerous Criminal Behavior and Sentencing Under the Federal Sentencing Guidelines, 87 Iowa L. Rev. 669, 680 (2002) ("The original Commission promised further research on the Chapter Four's criminal history measure, and this promise is remembered in each revised Guidelines Manual."). Only in the last year, has the Commission begun to undertake that research effort. See id. (According to Commission staff member, "the U.S. Sentencing Commission has announced that one of its fiscal year 2002-2003 priorities is an assessment of the Guidelines' Chapter Four. Acting upon this decision, the Commission is in the middle of a major two-year study of Guidelines recidivist behavior.").

167. See Robert W. Sweet, The Sentencing Commission's 1990 Annual Report and Beyond, 4 Fed. Sent. Rep. 126, 128 (1991) (suggesting that a renewed focus on purposes might lead to reexamination of entire guidelines); Miller, supra note 3, at 415 ("The high cost of current sentencing policies—in dollars and lives—justifies more effort to identify the benefits they produce. The introduction of explicit consideration of sentencing purposes to the criminal process might, over time, lead to a different understanding about what sentencing should and can achieve—and what it cannot. By bringing analysis of sentencing goals into focus in each case. . . . there is some hope that sentences whose purposes are unarticulated or purely political . . . will be undermined and that a new consensus about the role of sentencing might emerge.").

168. Miller, supra note 3, at 480-81.

any Commission initiative. And Congress is easily tempted to use that power. Criminal justice issues engender high passions, and sentencing makes a rich target for grandstanding politicians. The dangers become acute when the Commission takes positions on sentencing matters that conflict significantly with the preferences of a majority of legislators.

Some commentators have suggested that the Commission is defenseless to resist Congressional pressures.[169] But that may be overly pessimistic. The Commission certainly lacks legal authority to resist Congressional meddling. But it is not powerless to influence the political environment within which Congress operates.

In politics, perceptions matter, and the more success the Commission has in creating the perception that it has independent and legitimate authority over sentencing, the less likely that legislators will intervene in sentencing matters. This is a matter, in the end, of public relations. The Commission's challenge is to determine how it can influence public opinion to gain some degree of independence in the political sphere.

Although the answer is admittedly somewhat speculative, my contention is that a public statement of purposes is one tool for helping the Commission buttress its image in the sentencing field, and in so doing insulate its guideline decisions from criticism. A statement of purposes potentially offers the Commission two major benefits. First, it helps to strengthen the agency's *institutional legitimacy*; second it provides the agency with certain *rhetorical advantages* in marketing its decisions to the public.

Institutional legitimacy remains an important concern for the Commission. Simply stated, the Commission suffers from an image problem. It is widely felt—and, as

169. See, e.g., David Boener, Bringing Law to Sentencing, 6 Fed. Sent. Rep. 174, 176 (1993) ("The hope, and it could never been more than a hope, that sentencing commissions would serve to blunt the raw force of public opinion now appears naive.").

we have seen, not entirely without reason—that the Commission is overly political, frequently responding to Congressional interests and public opinion. As a "junior varsity Congress," to use Justice Scalia's memorable phrase, the Commission is a weak institution, with little independent authority.[170] The Commission does not "represent" the public, so it can not argue that it has the kind of authority typically associated with representative bodies like Congress.[171] Viewed as a political body, the Commission's authority appears entirely derivative of Congressional authority.

To change this perception, the Commission must begin to identify a non-political source of authority for its decisions. The SRA identifies one such source: the authority of moral principle. Only when the agency is viewed as the voice of principle, not politics, can the Commission achieve a sense of independent legitimacy in the public realm.[172]

This approach roughly resembles the way the judiciary itself preserves its legitimacy, even as it fulfills its countermajoritarian role. The judiciary's legitimacy depends, at least in part, on the perception that courts are acting in a principled manner.[173] And the Supreme Court has suggested that the same considerations support the

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170. Mistretta, 488 U.S. at 427 (Scalia, J., dissenting) (referring to the Commission as a "sort of junior-varsity Congress"). See also Parker & Block, supra note 36, at 1022 (criticizing Commission for acting like the "junior-varsity Congress that Justice Scalia feared").

171. Former Commissioner Nagel has suggested that the Commission actually represents a cross-section of society. See Nagel, supra note 15, at 922 n.215, 929. Given the Commission's personnel, that claim seems untenable.

172. See Dubber, supra note 64, at 692 ("[T]he very legitimacy of state punishment rides on its rationality. . . . It is precisely its rationality that helps the state to distinguish its inflictions of pain on criminal offenders from the subjective vengeful violence perpetrated by the state's constituents, whether it is the criminal's violence or the violence of the lynch mob. As soon as the state's violence in the form of criminal punishment becomes the mirror image of private violence and enters into a competition of violence with the criminal and the lynch mob, it loses its justification.").

173. Mistretta, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

Commission's claim to authority, as well.[174] For many, the appearance of principled decision making is particularly important in the punishment context. As Paul Robinson writes, "[o]nly a sentencing system that appears to distribute sanctions on a principled basis will inspire the confidence of the public and of participants in the system."[175]

In addition to strengthening the Commission's legitimacy, a statement of purposes offers the agency certain *rhetorical* advantages. Namely, it helps the Commission defuse criticism of its rules by clarifying the underlying rationale of its decisions. A statement of purposes will appeal, in particular, to individuals who share the Commission's favored penological objectives. For these observers, a statement of principles will serve as a basis for building consensus, not conflict.[176]

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174. Id. (The Commission "is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate.").

175. Robinson, supra note 60, at 8. See also Berman, supra note 3, at 102 (refocusing sentencing decisions on their underlying purposes will give them greater credibility).

176. The likelihood that the Commission's statement of purposes will provide a basis for consensus depends, of course, on the purposes that the Commission favors and how broadly those purposes resonate with the public. Predictions about which purposes the Commission might choose are speculative, at best. Nonetheless, past commissions have offered a few tantalizing clues about their philosophical leanings.

Perhaps most notably, the first Commission promulgated "drafting principles" that suggested a utilitarian orientation. Principle 1(g) affirms that "the overall purpose of the institution of punishment, like the criminal law itself, is to control crime." See Breyer, supra note 100, at 47. Principle 1(i) similarly acknowledges that just deserts and utilitarian goal of crime control sometimes conflict, and that when they do, "the resolution of the conflict will be based on principles of crime control unless a specific decision to the contrary is made by the Commission." Id. at 47-48. Although these drafting principles are not binding on the agency, they offer evidence of the initial commissioners' emphasis on crime control considerations.

In a separate paper, I argue further that utilitarianism is the best justification for a number of key guideline provisions today, and that it may be the best "rational reconstruction" of the guideline system as a whole. See Rappaport, supra note 8. Should the Commission expressly adopt a sentencing philosophy grounded on utilitarian principles, it would likely find broad support among citizens. As the Commission itself has stated, "[m]ost observers of the

Citizens who embrace a different penological purpose will find the Commission's statement of purposes less appealing. But even here, an explicit statement of principle can prove useful. As some commentators have observed, the public will often grant officials a measure of respect for taking principled stands, even if the public is not fully convinced by the substance of the underlying principles.[177] If that is so, then a Commission that appears to act in a principled manner, with the long terms interests of the community at heart, will have some freedom to enact rules even when those rules conflict with the public's own preferences.[178]

To gain these benefits, of course, the Commission can not simply claim it is acting in a principled manner. Rather, it must persuade the public and legislators that it really is principled. That means it must apply its

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criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime." U.S.S.G. Manual, Ch. 1, Pt. A, sec. 3 (policy statement).

177. See, e.g., Paul Simon, Ethics in Law and Politics, 28 Loy. U. Chi. L.J. 221, 224 (1996) ("[C]andidates who act against public opinion may find themselves penalized in the polls. But my experience is that over time the public comes to respect those men and women of principle who vote their conscience. These politicians gain an unexpected reward: a deep kind of public respect.").

178. To be sure, this claim can not be proved definitively, and we have limited data to assess whether it is true in the sentencing field. One situation where the Commission has challenged Congress is the issue of mandatory minimum statutes. In its report to Congress in 1991, the Commission sharply criticized the use of mandatory statutes to punish federal offenders, arguing that the sentencing guidelines offer a more rational and tailored approach to punishment than the one-size-fits-all approach used by the legislature. See Mandatory Minimum Report, supra note 24. The Commission followed up that challenge with several specific proposals to modify the sentences for crack and powder cocaine. The most recent proposal was dated May 2002 and, among other things, held that "the current penalties exaggerate the relative harmfulness of crack cocaine." U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy v (2002).

Whether the Commission suffered a significant loss of legitimacy as a result of this stand is unclear, though doubtful. In any event, my contention is that the Commission would have been on stronger grounds if it had set forth a clear governing rationale for the guideline system—say, crime control—and then marshaled evidence to show that mandatory sentences undermined that goal in the long run. Although the Commission claimed in its Mandatory Minimum Report that the penalty statutes were counterproductive, the argument was diluted by the Commission's failure to embrace a coherent sentencing philosophy.

principles consistently. And, to the extent it can, it must demonstrate that the specific content of its rules effectively promote a coherent vision.[179] When the Commission draws the link between its policies and principles clearly, it will gain authority in the political realm. For then, its "policies become meaningful embodiments of justice. The public may not agree with each guideline decision, but they will grant the statesman a measure of respect and, in turn, a degree of freedom to pursue her vision."[180]

This is certainly not to suggest that a statement of purposes will completely insulate the Commission from Congressional pressures, or eliminate controversy over the Commission's decisions. To the contrary, some politicians will not care whether the Commission's rules are grounded in principle or not. Some will be uninformed about the Commission's rationales. Some will criticize the Commission's opinions merely for self-interested political reasons. My claim is simply that the Commission has some modest ability to influence the public's perceptions of the agency's role. Articulating a statement of purposes may be one tool for buttressing the agency's image and for justifying its rules in the sentencing arena.

179. The Commission's claim that its policies promote overarching purposes will be most persuasive when the agency can claim special expertise in making that assessment. Certain purposes—like utilitarianism—may lend themselves to agency claims of expertise more than others.

For example, to accurately assess which rules best promote public safety goals, one would need to consider empirical studies on recidivism rates and deterrence effects. The Commission can plausibly argue that it has a special expertise in evaluating these studies, at least compared to the judicial or legislative branches. By contrast, the Commission's expertise is more suspect if the governing rationale is just deserts. The dominant version of just deserts imposes punishment based, in part, on the defendant's culpability for a given offense. It is not immediately clear why the Commission is better suited to make this assessment than, say, Congress or the public at large.

180. Aaron Rappaport, Speaking of Purposes, 12 Fed. Sent. Rep. 95, 96 (1999). See Walter Lippmann, The Essential Lippmann 456-57 (1963) ("[W]hen a statesman is successful in converting his constituents from a childlike pursuit of what seems interesting to a realistic view of their interests, he receives a kind of support which the ordinary glib politician can never hope for.").

V. POTENTIAL CRITICISM

The previous sections suggest that the Commission has compelling reasons to articulate its sentencing philosophy. A public statement of purposes would vindicate Congressional intent, reduce sentencing disparities and enable the Commission to make an independent judgment of sentencing severity. The argument for a public statement of purposes, however, is not without its detractors.

One challenge has been developed by Cass Sunstein, who has criticized the idea that decision makers should articulate the moral and political principles that underlie their decisions. A second has been advanced by commentators who claim that the judiciary, rather than the Commission, should take the lead in identifying the purposes of the guideline system. The following sections consider these two arguments in turn.

A. Incompletely Theorized Agreements

In recent works, Cass Sunstein has focused on the way in which public officials explain and justify their decisions to the public and to each other.[181] He has argued that officials should hesitate to articulate their underlying moral and political principles. Rather, they should adopt what he calls "incompletely theorized agreements"—agreements that are silent about underlying ideals and presuppositions. Although Sunstein's primary focus is on whether *judges* should express theoretical rationales for their decisions, he extends his analysis to other institutions, including the Sentencing Commission. Indeed, Sunstein cites the Sentencing Commission's

181. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733, 1745 (1995) (noting that his principal concern is with the way members of "a multi-member body should justify their opinions in public"). See also Sunstein, supra note 93, at 53.

empirical approach as an illustration of the benefits of using incompletely theorized agreements.[182]

Sunstein's argument in support of incompletely theorized agreements is nuanced, but rests on a simple observation: Moral and political assumptions are often controversial. Making these premises explicit, therefore, can undercut the ability of decision makers to gain public and political acceptance for their rules. Sunstein thus repeatedly expresses a concern for preserving social "stability" and "consensus" in the face of moral and political division.[183]

The Commission has expressed a similar concern when speaking about sentencing purposes. Indeed, in its Supplementary Report, the Sentencing Commission seemed to embrace, and even foreshadow, Sunstein's claims. There, the Commission rejected commentators' arguments that it choose a dominant purpose of punishment, concluding that this "would have diminished the chance that the guidelines would find the widespread acceptance they need for effective implementation."[184]

Sunstein's argument is superficially appealing, but it fails to account for the Commission's unique institutional role in the sentencing field. As Sunstein himself acknowledges, the strongest claim for incompletely theorized agreements arises in a particular kind of

182. See Sunstein, supra note 93, at 9 ("the Commission abandoned large theories altogether. It adopted no general view about the appropriate aims of criminal sentencing. Instead, the Commission abandoned high theory and adopted a rule—one founded on precedent"). See also Sunstein, supra note 181, at 1743-44 (discussing Commission's empirical approach).

183. Sunstein, supra note 93, at 5 ("Incompletely theorized agreements are . . . an important source of social stability and an important way for people to demonstrate mutual respect"). See also id. at 41 (Incompletely theorized agreements "have the critical function of reducing the political cost of enduring disagreements."); id. at 39 (Incompletely theorized agreements "are well-suited to a world—and especially a legal world—containing social dissensus on large scale issues. . . . This advantage is associated . . . with social stability, which could not exist if fundamental disagreements broke out in every case of public or private dispute."); id. at 41 ("[I]ncompletely theorized agreements have a crucial function of reducing the political cost of enduring disagreements. If judges disavow large-scale theories, then losers in particular cases care much less.").

184. Supplementary Report, supra note 14, at 16.

situation—where decision makers and members of the public agree on an appropriate ruling but disagree on the underlying justification for the decision.[185] In those cases, incompletely theorized agreements permit individuals with different ideological commitments to agree on specific legal outcomes.

As Sunstein seems to recognize, however, incompletely theorized agreements have diminished appeal in cases where disagreement exists about the appropriate outcome for a decision. What should a public official do, for example, if she concludes that the prevailing consensus is misguided or misinformed? One answer is for the official to defer to the public and avoid controversy. But that option is not available under the SRA, which calls on the Commission to make an independent judgment about just punishment levels.[186] The agency's institutional role, if taken seriously, will inevitably result in situations where the Commission's preferred rule conflicts with the public's beliefs about appropriate sentencing levels.

The Commission's challenge, in short, is to find a way to defend its decisions against public and political criticism.[187] That requires the Commission to persuade

185. Sunstein, supra note 93, at 38 ("What is critical is that they agree on how the case must come out."). See also id. (discussing cases where "the relevant participants are clear on the result without agreeing on the most general theory that accounts for it").

186. Sunstein himself acknowledges that social consensus is not the ultimate end of society, and that situations may arise where justice demands opposition to public opinion. See Sunstein, supra note 181, at 1769 ("[N]or is social consensus, or something approaching consensus, a consideration that outweighs all else. Usually, it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which most or even almost all agree. Consensus or agreement is important largely because of its connection with stability, itself a valuable but far from overriding social goal."). I have argued elsewhere that social consensus and stability are best characterized as pragmatic constraints on efforts to achieve moral ends, rather than ends in themselves. See Rappaport, supra note 49, at 496.

187. This is not to suggest that the Commission should ignore public opinion entirely, for the Commission's long term viability depends ultimately on public and political support. But treating public opinion as a pragmatic constraint on decision making is not the same as suggesting that an institution should reflexively mirror public opinion. Rather, "it is best to see deserved punishment as a range—anything below the lowest punishment will offend the community's

others that, at a minimum, its judgments are worthy of deference, even if the specific outcome of its rulemakings appear controversial.[188] As I have argued, a statement of purposes may help in this endeavor by reinforcing the Commission's institutional legitimacy and by clarifying the principled basis of its decisions.[189]

To be sure, such a statement might prove controversial, and one can not be certain that the benefits of principled decision making will outweigh the potential controversy that might arise from its choice of philosophy. But the first fifteen years of the Commission's existence have made one thing clear: Remaining silent on purposes does nothing to defuse potential controversy over guideline decisions that conflict with public opinion.

In this sense, continued silence on purposes constitutes a concession of defeat by the Commission, virtually an acknowledgment that it is unable to serve as an independent voice of principle in sentencing affairs.[190] Before that concession is made, the Commission should try all plausible alternatives. Articulating a public philosophy at least offers the possibility that the Commission will gain

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sense of justice, and anything above the highest will seem to community members to be excessive. But any punishment between the minimum and maximum will serve the community's need for the imposition of a just penalty." Franklin Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California 188 (2001) (citing works by Norval Morris). My contention, further, is that public officials have some ability to influence where the upper and lower bounds of acceptable punishment might be, in part by articulating in a persuasive and principled manner the rationales for their decisions.

188. This is the ultimate test of leadership. See James MacGregor Burns, Leadership 461 (1978) ("The ultimate test of practical leadership is the realization of intended, real change that meets people's enduring needs," not merely short-run goals.).

189. Sunstein recognizes that principled decision making has many advantages—such as providing "notice" of a rule's scope, and rooting out bias and inconsistency. See, e.g., Sunstein, supra note 93, at 44, 51, 53. But he treats these advantages as secondary.

190. See Miller, supra note 3, at 439 ("The Commission's explanation that it decided not to choose between two basic purposes because the choice was too political conflicts with Congress's rationale for creating an administrative body, removed from the political fray, to develop sentencing rules.").

some respect for itself and its decisions. In any event, the Commission has little to lose in trying.

Sunstein offers one final argument for incompletely theorized agreements—one that he implies has special relevance for an agency like the Sentencing Commission. He suggests that suppressing moral and political principles will enable government officials to agree more easily on rules to be promulgated.[191] This is particularly important, Sunstein suggests, in multi-member institutions that operate partly through consensus, such as panels of appellate judges or—more to the point—sentencing commissioners.[192]

Sunstein is undoubtedly correct in this respect: The empirical approach helped the members of the original Commission break a deadlock over the governing purpose of the sentencing system and issue its rules on time.[193] But this argument for an incompletely theorized sentencing agreement is a limited one. It does not detract from the claim that, were an agreement possible, a public statement of purposes would be more desirable, both because such a statement would vindicate Congressional intent and because it would help advance the policy goals of the SRA.

The failure to articulate a public sentencing philosophy, in short, should be understood for what it is—a failure by the Commission to fulfill important legal and institutional obligations for pragmatic reasons. That failure should be a cause for embarrassment, not for celebration.

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191. See Sunstein, supra note 93, at 9 (The Commission's empirical approach made it "possible for people to converge on particular outcomes without resolving large-scale issues of the right or the good. People can decide what to do when they disagree on exactly how to think.").

192. Sunstein, supra note 181, at 1735 (Judges "have to decide many cases, and they have to decide them quickly. . . . In addition to facing the pressures of time, these diverse people must find a way to continue to live with one another. They should also show each other a high degree of mutual respect and reciprocity. Mutual respect may well entail a reluctance to attack one another's most basic or defining commitments . . . .").

193. See Sunstein, supra note 181, at 1744 (noting that "Justice Breyer saw this effort as a necessary means of obtaining agreement and rationality within a multimember body charged with avoiding unjustifiably wide variations in sentencing").

And an awareness of this failing should serve as a spur for continued efforts by the commissioners to achieve greater consensus on the governing purposes of the guideline system.

B. The "Common Law" Approach

A second argument against a Commission statement of purposes has been advanced by theorists who *agree* that such a statement would improve the operation of the guidelines. These theorists, however, tend to question whether the *Commission* should be the principal institution responsible for developing that philosophy. According to this view, the *federal courts* should participate, or even take the lead, in the process of developing a philosophy of the guidelines. Douglas Berman has called this approach the "common law" method of developing a sentencing philosophy.[194]

1. Sentencing Purposes and the Courts

Advocates of the common law approach point out that Congress gave the courts, as well as the Commission, the statutory authority to identify the purposes of the guidelines. In fact, numerous provisions of the SRA direct the judiciary to consider the purposes of punishment when implementing the guideline rules.[195] Relying, in part, on these provisions, Berman concludes that, "both federal judges and the Sentencing Commission [are] responsible for . . . ensuring that guideline sentencing would be developed around and governed by the purposes of sentencing."[196]

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194. See Berman, supra note 3, at 93 ("[U]nder the SRA, the federal judiciary has considerable power to develop a meaningful common law of sentencing and thereby shape the content and direction of federal sentencing law."); id. at 96 (arguing that the "particulars of sentencing law would evolve through the collaborative efforts of an expert commission (providing a system-wide perspective) and an experienced judiciary (providing a case-specific perspective)").

195. See Berman, supra note 3, at 97. See, e.g., 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment.).

196. Berman, supra note 3, at 98.

The idea of a partnership between the courts and the Commission sounds appealing, but it raises a difficult question: What happens if the two institutions disagree about a governing philosophy? Which institution has the ultimate authority to define the governing purposes of the guidelines? The answer, I will suggest, is that Congress gave the Commission the ultimate authority to identify the guidelines' purposes.

As a policy matter, the Commission – and not primarily the courts – have the institutional obligation to reduce sentencing disparity. As suggested previously, a statement of purposes is essential for fulfilling this institutional goal. Permitting courts to disregard the Commissions' rationales when interpreting guideline rules or departing from the guidelines would reintroduce disparity and uncertainty into the system. Implicit in the Commission's obligation to reduce disparity, then, is the ultimate authority to identify the purposes underlying the guidelines.

Moreover, as a matter of legislative history, Congress expressed a desire for the federal sentencing system to be governed by a uniform approach to sentencing purposes.[197] Permitting judicial reinterpretation of guideline purposes would allow different principles to come into play at various stages of the sentencing process, contrary to legislative wishes.[198] Only by treating the Commission

197. The Senate Report emphasizes that the entire sentencing system should be directed toward a consistent sentencing philosophy at all stages. See Senate Report, supra note 25, at 39 (reform efforts "should assure that each stage of the sentencing and corrections process, from the imposition of the sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society."). Congress' decision to abolish the parole board was based, at least in small part, on the conclusion that the board might adopt a different sentencing philosophy than the Commission. See id. at 55 (warning that "the Parole Commission might be basing decisions on a different sentencing philosophy than is reflected in the sentencing guidelines").

198. An even more radical view is that the judiciary has the authority to depart from the guideline range if it believes that this range does not adequately promote the judiciary's preferred purposes. No court has adopted this radical approach, probably because it would allow the judiciary to usurp the Commission's central role as the ultimate arbiter of sentencing policy. Such a

rationales as authoritative can this inconsistency be avoided.

Finally, under ordinary principles of administrative law, an agency entrusted with implementing a statutory scheme has the authority and discretion to balance and reconcile conflicting statutory objectives as it sees fit.[199] It would be bizarre if the SRA authorized the Commission to establish rules and define their objectives, but then gave the courts the power to state what those rules "really meant." That result can be avoided only if the Commission is given the ultimate authority to promulgate a binding statement of purpose.

If the Commission has the legal authority to define the guidelines' overarching philosophy, then the common law claim is significantly diminished. It means that courts have a role in identifying sentencing purposes *only if the Commission remains silent.* If that is so, the only remaining question is whether the Commission *should* remain silent to allow the courts to take the lead in developing a sentencing philosophy.

Why might the Commission defer to the judiciary in this way? Common law theorists do not offer a clear

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position also violates clear expressions of Congressional intent. See Senate Report, supra note 25, at 79 ("The Committee rejected an amendment by Senator Mathias which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense or offender characteristics in the development of the sentencing guidelines.").

199. See, e.g., Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 845 (1984), quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'").

answer, but two possible reasons might be offered. First, one might believe that the judiciary is simply more likely to complete the task in the immediate future, so the Commission might reasonably wait and see how the courts resolve the issue before acting. Second, one might believe that the judiciary is simply more capable than the Commission in identifying the appropriate sentencing purposes. Neither contention, however, is ultimately compelling.

In the first case, the idea that the courts are likely to identify the purposes of guideline provisions in the near future seems fanciful, at best. The federal courts have shown no inclination to undertake the effort needed to complete the project, and only a very few decisions have addressed the purpose of individual guideline provisions in any detail.[200]

Moreover, even if the courts were to seek to identify the guidelines' rationale, the decentralized structure of the federal judiciary would severely hamper efforts to develop a coherent sentencing philosophy. Judges, after all, favor different purposes of punishment, and their interpretation of specific guideline provisions would inevitably reflect these differences.[201] Appellate courts, and ultimately the Supreme Court, would have to resolve these differences—a process that could take years to complete.[202] During the

200. See Berman, supra note 3, at 106 (judicial sentencing decisions have rarely discussed sentencing purposes); Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U.L. Rev. 1441, 1468 (1997) ("Perhaps the most disappointing aspect of the appellate departure jurisprudence has been its divorce from the underlying goals of punishment").

201. See supra note 153, and accompanying text.

202. Moreover, judicial attempts to identify the purposes underlying guideline provisions could lead to inconsistencies among the various parts of the guideline system itself. Suppose, for example, that one court held that utilitarianism underlies the guideline rules for heroin trafficking, while another court ruled that retribution underlies the guidelines for cocaine trafficking. This difference in treatment seems unjustifiable; ideally, a principled rationale should exist for having different purposes backing different guideline provisions. A court would face significant difficulties in resolving these kinds of inconsistencies, since any single court typically considers the implementation of only a few sentencing rules at a time.

interim, different rationales would govern in jurisdictions across the nation, resulting in continuing sentencing disparities.

Even if the judiciary is unlikely to complete the process in the near future, the Commission might still defer to the courts if the commissioners believed that the courts would do a better job of identifying the underlying purposes of the guideline system. But, again, there is no obvious reason to believe that this the case. Indeed, it seems counterintuitive to believe that the courts have greater insight into the purposes of the Commission's rules than the Commission itself.

Some commentators suggest that the courts have certain institutional advantages in identifying sentencing purposes by using a common law method of reasoning. A claimed advantage of common law reasoning is its incremental approach to developing legal rules. Common law courts ostensibly resolve issues on a case-by-case basis, testing the appeal of legal rules in different factual contexts. The expectation is that, over time, the rules will be shaped and tailored to serve the public good.[203]

Although certainly an attractive picture, this incremental approach is less relevant in the context of guideline rulemaking. Unlike common law rulemaking, the governing rules in this case have already been established, and they bind the courts. A court, in other words, has only limited discretion to alter rules when confronted with new factual settings. In this situation, the principal task is not to fashion new rules, but to draw from the Commission's rules the underlying principles that rationalize the guideline system.

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203. See, e.g., Leslie P. Francis, Law and Philosophy: From Skepticism to Value Theory, 27 Loy. L.A. L. Rev. 65, 73 (1993) (Under the common law, "legal judgment about duties in particular cases precede the formation of general principles. Particular judgments are tested in light of felt convictions about the correctness of the result and in terms of new cases. Gradually, general principles emerge, which in turn shape convictions in new cases; law develops through a dynamic interaction between cases and principles.").

To accomplish that task, an institution needs a system-wide perspective, with the research capabilities to study the rules and develop an integrated sentencing philosophy. Moreover, this task—a philosophical exercise with enormous practical consequences—requires a long term commitment on the part of any institutional actor. Courts have neither the time, nor the necessary perspective on the system, to undertake this effort effectively.

The Commission, by contrast, is well suited for the challenge. It is a centralized entity with extensive knowledge of the entire guideline system. It has the means to ensure that individual guideline provisions have a coherent rationale, and that individual guideline provisions are consistent with each other. Perhaps most importantly, it has the time and commitment to undertake the kind of long-term study needed to develop a compelling sentencing philosophy.

This is not to suggest that the courts should play no role in the process. The Commission will face significant challenges in identifying the rationale of the guideline system and in trying to reach agreement among its members on a set of rationales. In the meantime, courts can provide insights into the rationale behind individual guideline rules; judicial commentary may even spur the Commission to further action. The point here is simply that the ultimate obligation to define a sentencing philosophy lies with the Commission. It would be a shame if the Commission were to neglect that obligation in the unrealistic hope that the judiciary will accomplish the task first or more effectively.

2. Purposes and the Commission: Looking Forward

The Commission's task in identifying a sentencing philosophy will certainly not be easy. The challenge will be particularly difficult if the Commission attempts to articulate, all at once, a global sentencing philosophy that governs the entire sentencing system. A more realistic blueprint would call on the Commission to approach the task in a series of phases.

As an initial step, the Commission might begin by identifying the purpose or purposes underlying specific and significant guideline provisions. Since, as we have noted, sentencing rules are sometimes consistent with only one theory of punishment, this effort may require the Commission to identify a single theory underlying individual guideline provisions. Identifying the purposes of these guidelines will help to clarify the scope and meaning of the rules and will, as a result, reduce sentencing disparities. It will also begin to demonstrate the principled basis of the Commission's rulemaking, thereby strengthening the Commission's authority in the sentencing field.

The next step will likely prove even more challenging. As the Commission begins to articulate the purposes of individual guidelines, it may find that the purposes used to justify one guideline rule conflict with the purposes used to justify another.[204] Those conflicts undermine the perception that the Commission is acting in a principled manner; they make it appear that the Commission's choice of purposes lacks coherence. Without an official explanation for the adoption of conflicting rationales, one might suspect that the choice of purposes is a post-hoc rationalization for punishment decisions made on partisan, arbitrary, or discriminatory grounds.

Ideally, then, the Commission will proceed further. In the second phase, the Commission should attempt, not only to identify the purposes that underlie individual guideline provisions, but also to explain why the various purposes are consistent with each other—why they fit into a coherent overarching philosophy.[205]

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204. For an illustration, see Rappaport, supra note 8 (discussing tension between utilitarian and retributive principles of punishment).

205. This requirement might be called "horizontal consistency." Where vertical consistency requires individual guidelines to promote their designated purpose, horizontal consistency means that the various purposes underlying guideline decisions must be consistent with each other. The idea of horizontal consistency is a subject of some controversy among theorists, for it raises questions about whether different moral principles—such as utilitarianism and just deserts—can be integrated into a coherent moral vision. I address this important topic in a

A statement of purposes that is able to meet this higher level of coherence will appear deeply principled: The different elements of the philosophy will be mutually reinforcing and internally consistent. All aspects of the rules will be grounded in a common value system. We might call this sort of purpose-based system a fully rational (or coherent) sentencing philosophy.[206] This sort of sentencing philosophy will provide the courts with clear guidance on the underlying goals of the guideline rules, thereby reducing disparity. And it may help to solidify the impression that the Commission is a principled entity, deserving of respect from the public, Congress, and the judiciary.

To be sure, the development of a fully rational sentencing philosophy is an ideal—one that may never be fully realized. But the Commission can at least begin to take steps towards greater rationality by articulating the purposes that underlie at least some of the most important guidelines. And that, in itself, is a step towards achieving a more just and principled sentencing system.

CONCLUSION

In enacting the Sentencing Reform Act of 1984, Congress initiated major changes in the federal sentencing system. Perhaps the most important change was philosophical in nature: Congress directed the Commission to develop a principled sentencing system, one that reflects a coherent and consistent sentencing philosophy. For the past 15 years, the Commission has neglected this obligation, suppressing any extended discussion of sentencing purposes. I have argued in this paper that this

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separate paper. Rappaport, supra note 8.

206. Although the SRA is not entirely clear on this point, this approach seems consistent with the aspirations of the Act's drafters. Thus, the Senate Report speaks of the Commission's role in developing a "consistent sentencing philosophy." See Senate Report, supra note 25, at 59 ("For the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy"); id. at 79 (speaking, in passing, of a "rational order in sentencing").

neglect has cost the Commission in significant ways. It has undermined the agency's ability both to reduce sentencing disparity and to serve as an independent voice of authority in sentencing matters.

The best way to remedy these flaws is for the Commission to embrace the only source of independent authority available to it—the authority of principle—and to begin the process of demonstrating how its guideline decisions reflect a distinct conception of sentencing purposes. Such a path can help the Commission persuade the public and Congress that it is something more than a junior varsity legislature, and it can empower the agency to exercise leadership in the sentencing field.

To be sure, articulating a rational sentencing philosophy will not remedy all of the flaws that infect the guideline system.[207] It will not eliminate all sentencing disparities. It will not insulate the Commission completely from political or public pressures. Additional changes, including statutory modifications in the structure of the Commission, might also be necessary to ensure that the Commission and the guidelines are well-functioning.[208] Nonetheless, even if the effect of this strategy is modest, it is one of the few tools that the Commission has at its disposal to deflect criticism of its guideline decisions. And this approach has one additional advantage: It can be implemented by the Commission itself without waiting for statutory changes.

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207. Accord Miller, supra note 3, at 478-79 (suggesting that clarification of sentencing purposes will not be a cure-all for Commission's woes).

208. As I have suggested, one reason for the Commission's political sensitivity is its composition. The commissioners themselves are political appointees. Historically, only slightly more than half of the commissioners have been life-tenured judges; a recent amendment will further reduce the representation of federal judges on the Commission. See 28 U.S.C. § 991 (2003) ("Not more than 3 of the [seven voting] members shall be Federal judges"). This institutional structure makes the agency more vulnerable to political pressures than if the commissioners were, say, *all* life-tenured judges chosen by the Judicial Conference. In this regard, statutory changes in the institutional structure of the agency may ultimately be the most effective way to insulate the Commission from politics.

One final question naturally arises: Is the project feasible? How can the Commission hope to articulate a coherent sentencing philosophy when generations of theorists have been unable to resolve the debate between utilitarianism and retribution? I certainly believe that an answer to that question can be offered. But this article's goal is to explain *why* it is crucial for the Commission to articulate punishment purposes. *How* it should do so, and *what* methodology it should use is a topic for another day.[209]

209. See Rappaport, supra note 8.